Jurisdictional Statement

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81-462

No. .....

IN THE

Supreme Court of the United States

October Term 1981

SPIEGEL, INC.,
Appellant,

v.

GEORGE WHITAKER and MARGARET C. WHITAKER and ALL OTHER PERSONS SIMILARLY SITUATED SINCE DECEMBER 5, 1968,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the Washington Supreme Court err in ruling that the local regulation of interest rates and credit transactions in interstate commerce is not a matter of predominant national concern?

2. Where there is no dispute that a state statute imposes a prohibitive burden on interstate commerce, may a state court refuse to weigh that burden against the statute's putative benefit and hold there is no unconstitutional burden on interstate commerce?

LIST OF PARTIES TO THE PROCEEDING and PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Appellant Spiegel, Inc., a Delaware corporation, is a subsidiary of Beneficial, Inc., a Delaware corporation. It is anticipated that during the period of this appeal Spiegel will be acquired by Otto-Versand, JmbH, a Federal Republic of Germany limited partnership.

The appellees are George Whitaker and Margaret C. Whitaker, his wife. This case was certified below as a class action by order of the Spokane County Superior Court dated March 13, 1980, with the class members being defined as "all Washington residents transacting credit purchases with the Defendant who are otherwise entitled to recover damages pursuant to RCW 63.14 and or RCW 19.52 or pursuant to the common law doctrine of assumpsit."

Pursuant to S.Ct. Rule 28(c), Spiegel states that 28 U.S.C. §2403(b) may be applicable, and that service upon the Washington State Attorney General has been made.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

Spiegel, Inc. ("Spiegel") appeals from the final judgment of the Washington Supreme Court holding that the imposition of Washington's 12% service charge and interest rate limitation upon Spiegel's interstate credit sales did not violate the Commerce Clause of the United States Constitution.

OPINIONS BELOW

The February 11, 1981 opinion of the Washington Supreme Court in *Whitaker v. Spiegel* initially was reported at 95 Wn.2d 408, 623 P.2d 1147 (1981) [Appendix, p. A-42]. Following Spiegel's Motion for Reconsideration, on June 4,

1981 the court amended its opinion [Appendix, p. A-105]. The amended opinion appears at 95 Wn.2d 661, ... P.2d .... (1981) [Appendix, p. A-1].

JURISDICTION

The final judgment of the Washington Supreme Court was entered on June 4, 1981 following Spiegel's motion for reconsideration.

A notice of appeal was filed with the clerk of the Washington Supreme Court on August 24, 1981, and a copy of that notice of appeal also was filed with the Spokane County Superior Court, which is the court possessed of the record, on August 24, 1981 [Appendix, p. A-109].

This appeal is being docketed in this Court within 90 days from the date of the final judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Commerce Clause (Article I, Section 8, Clause 3), United State Constitution:

> The Congress shall have power . . . to regulate Commerce . . . among the several states . . .

Washington Statutes:

Pertinent portions of the Washington Retail Installment Sales Act (RCW Ch. 63.14) and the Washington usury statute (RCW Ch. 19.52), as they read prior to the 1981 amendment of each, are set forth in the Appendix [pp. A-113, A-116]. At issue in particular are the 12% maximum service charge rates and interest rates set forth in RCW §63.14.130 and §19.52.020, respectively.

STATEMENT OF THE CASE

Appellant Spiegel, Inc. ["Spiegel"] is a Chicago based company which sells goods by mail order, and which maintains no offices or retail outlets in the State of Washington. For a portion of the time in question in this case Spiegel charged in its revolving charge agreements a 19.8% service charge rate, which was within the maximum rate permitted under Illinois law but which exceeded the 12% service charge rate set by the Washington Retail Installment Sales Act, RCW Ch. 63.14. In the spring of 1976 Spiegel learned that a Washington trial court had ruled in another case (to which Spiegel was not a party) that the 12% limitation of the Retail Installment Sales Act would be applied to mail order catalog sales. Although Spiegel believed this ruling to be contrary to law, Spiegel lowered its service charge rate to 12% as of June 1976. Simultaneously Spiegel ceased accepting orders on credit from any new customers, for the reason that it knew it could only operate at a loss under a 12% ceiling. Spiegel retained its old credit accounts as a matter of customer relations.

Following this, in November 1976 plaintiffs George and Margaret Whitaker, customers of Spiegel for several years, brought suit against Spiegel, claiming that the service charge rate charged by Spiegel violated the Washington Retail Installment Sales Act (RCW Ch. 63.14), the Washington usury statute (RCW Ch. 19.52), the Washington Consumer Protection Act (RCW Ch. 19.86) and Article XII, Section 7 of the Washington State Constitution. At that time the Washington usury statute, like the Retail Installment Sales Act, had a 12% limit.

In June 1979 Spiegel moved for summary judgment of dismissal on two distinct grounds. The first ground was

that, for a number of different reasons, the Washington law under which the action was brought did not apply to Spiegel's charge agreements. The second ground on which Spiegel based its motion was that if Washington law were found to apply, then that law would be unconstitional as an undue burden upon and discriminatory against interstate commerce under the Commerce Clause.

The summary judgment hearing was held before the Spokane County Superior Court, which denied Spiegel's motion, ruling, *inter alia*, that giving effect to Washington law under the circumstances did not result in an unconstitutional burden nor discrimination against interstate commerce [Appendix, p. A-81].

Spiegel appealed from this ruling to the Washington Court of Appeals, from which the case was transferred to the Washington Supreme Court. Here again Spiegel advanced arguments based upon two grounds: first, that the Washington law did not apply to it, and second, that if that law were construed so as to reach Spiegel's charge agreements it would be unconstitutional under the Commerce Clause.

The undisputed evidence showed (1) the effect of a 12% ceiling *prohibited* interstate mail order houses from doing business in the state and (2) that any purported benefit of such a low ceiling to Washington residents was illusory or at best, highly questionable. Spiegel pointed to the following unchallenged evidence: Washington's 12% ceiling was one of the four lowest in the United States. Due to the inherent, necessary cost of extending credit, a 12% interest or service charge rate is not adequate to allow lenders to make relatively large loans, much less allow retailers to sell on revolv-

ing credit terms where the average balances are much smaller. Most retailers at best only break even on credit costs when the service charge rate is 1½% per month.

The effect of inflation in the past decade has made the effects of a 12% limitation even more severe. It is unarguable that merchants in every part of the United States must live with a prime interest rate which is national in application. It is also without challenge that the cost of money and credit has risen dramatically since the evidence in this case was submitted to the trial court, with the prime rate rising from 6% to 21% during the course of this litigation. The burden on interstate commerce by a protectionist limitation of interest and service charge rates grow more severe with the passage of time.

Undisputed evidence adduced below further showed that Washington retailers limited by this 12% rate must and do find alternative ways to recover the credit losses which are inevitable under a 12% rate—they raise prices, tighten credit-worthiness standards and charge for certain services which previously were "free", such as delivery, check cashing and parking. The result is that cash customers are forced to bear part of the merchant's credit costs and credit becomes unavailable to the less credit-worthy customers—the poor and other high risk borrowers who ironically are the category of customers who generally are in greater need of credit. Expert economic testimony introduced by Spiegel established without contradiction it is the Washington consumer, not the retailer who is penalized by a low interest rate. This conclusion of Spiegel's economists is bolstered by an impressive source, *Consumer Credit in the United States, Report of the National Commission on Consumer Finance* (1972). In that study the Commission too concluded that a

1% per month limit is detrimental, not beneficial to consumers:

> There is no logical reason to select any type of product or service sold by a retailer and legally require it to be sold at a loss. When credit is selected as the required loss leader, the burden of subsidy falls primarily on cash buyers, some of whom may have been unable to obtain credit. *Thus state laws that put the price of credit below competitive rates are forcing both the wealthy and the less affluent who do not use or cannot obtain credit to subsidize the use of credit to others.* Such laws also tend to discourage those who can obtain credit from using cash to buy goods. In the Commission's view, *lowering rate ceilings on revolving credit below 1½ percent per month has on balance been contrary to the best interest of consumers.* (*Id.* at 107, emphasis added)

Spiegel showed below that it and other interstate mail order catalog sellers necessarily would operate at a loss under a 12% service charge rate as Spiegel in fact has done since lowering its service charge rate to 12% in June 1976. Spiegel demonstrated it could not raise its prices to recoup its credit losses. Because of the losses sustained in Washington under the 12% rate Spiegel accepted no new applications for charge accounts from Washington residents since lowering its service charges to that rate.

Based on the evidence Spiegel urged the lower court to undertake a judicial weighing of the burden and benefits of a 12% limitation, contending that the evidence would clearly show the burden to be unreasonable and unconstitutional. This the Washington court flatly refused to do, stating:

> In the absence of "predominant national concern," the state need only establish that there is some state benefit and that the means chosen reasonably furthers the state goal.

Spiegel also argued that Washington's 12% ceiling unconstitutionally discriminated against out-of-state mail order sellers, who cannot "bury" their credit costs in increased prices as the local retailers do in order to operate under a 12% ceiling. (See in this regard, *Mourning v. Family Publications Service*, 411 U.S. 356, 366, 36 L.Ed.2d 318, 328 n.26 (1973)). The Washington court rejected this argument as well.

As mentioned earlier, plaintiffs sued under both the Retail Installment Sales Act and the state usury statute. Prior to the court's decision below in *Whitaker v. Spiegel*, the law of Washington had been that installment credit sales did not constitute loans or forebearances, and hence were not subject to the state usury statute. *Hafer v. Spaeth*, 22 Wn.2d 378, 156 P.2d 408 (1945). In its decision below, however, the supreme court overruled *Hafer v. Spaeth*, and held that henceforth installment credit sales would be deemed subject to the usury statute as well as the Retail Installment Sales Act.

In sum, the Washington Supreme Court ruled that both the Washington usury statute and its Retail Installment Sales Act applied to Spiegel's mail order credit sales, and that the application of these statutes to this conduct did not violate the Commerce Clause of the United States Constitution.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Washington Supreme Court based its refusal to engage in the judicial weighing of burdens and benefits mandated by this Court in Commerce Clause cases for the reason that it found no "predominant national concern" involved in this matter of interstate credit transactions. This may or may not have been true in the past; in present times, however, the interstate credit transaction plays a critical role in the functioning of this society, and cannot be dismissed as a matter of little significance.

The constrictive effects of state usury laws have become and are being recognized as an impediment to interstate commerce and a matter of national concern. Recent state and federal actions reflect the concern that the free flow of money, credit, goods and services is being jeopardized at many levels by the imposition of outmoded laws of individual states, a situation not unknown to the framers of the Federal Constitution.

The federal government has sought to remedy this situation, *albeit* on a piecemeal basis and for specific problems. The National Bank Act, 12 U.S.C. §85, frees all national banks from the constraints of individual state laws other than the laws of the state of residence of the bank. In the Depository Institutions Deregulation and Regulatory Simplification Act, 12 U.S.C. §1735-7, Congress addressed the inability of those states with constitutional usury limitations to correct their own problems by preempting both state laws and state constitutions. In 1980 the Federal Reserve Board, pursuant to its emergency powers under the Credit Control Act, 12 U.S.C. §1901 *et seq.*, temporarily preempted all state consumer credit laws regulating changes

in the terms of open end consumer credit, 12 C.F.R. §229-6. Earlier, Congress had addressed other facets of this national problem by enacting the various statutes now contained in the Consumer Credit Protection Act, 15 U.S.C. §1601 *et seq.*

Awareness of this national problem has not stopped with the federal government. Following the decision of this Court in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 58 L.Ed.2d 534 (1978), a number of state legislatures have sought to free their own local financial institutions from the effects of these local laws so that they may compete effectively with national banks, and recently have totally deregulated charges for the extension of credit in many areas. See, *e.g.*, Ariz. Rev. Stat. §§44-291, -1201 and -6002; Del. Code Ann. Ch. 6, §§2301 and 4315; N.J. Rev. Stat. §§17.16C-41 and -44.1; N.Y. Pers. Prop. Law Art 9 §303 and Art. 10 §404. Clearly local regulation of interstate credit transactions is not a matter a state court can dismiss by flatly assuming that interest rates are not a matter of "predominant national concern."

This case involves one of the purest forms of interstate commerce. It is undisputed in the record below that Spiegel has no agents, employees, retail stores, offices or property in Washington, and that Spiegel's sales to Washington residents are conducted exclusively by mail. In discussing this same kind of conduct in a previous decision, this Court has stated:

> [I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved.

National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753, 759, 18 L.Ed.2d 505, 510 (1967). It is this kind of

conduct that the Washington Supreme Court ruled is subject to the burden of that state's ceiling on interest rates.

We recognize that the fact that a state statute imposes a burden upon interstate commerce does not, in itself, establish that the statute is unconstitutional under the Commerce Clause, but any such burden must be reasonable if it is to withstand constitutional scrutiny. In deciding whether the burden is reasonable, this Court has directed that the adverse impact upon interstate commerce must be weighed against the local interests benefited by the state statute in question.

This principle was reaffirmed most recently in *Kassel v. Consolidated Freightways*, ... U.S. ....., 67 L.Ed.2d 580 (1981), where this Court found an Iowa statute limiting truck lengths within the state to be an unconstitutional burden on interstate commerce. The state of Iowa argued that the statute was a legitimate exercise of its power to enact safety measures to protect its citizenry. To this the Supreme Court replied:

> But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. In the Court's recent unanimous decision in *[Raymond Motor Transportation v. Rice*, 434 U.S. 429, 54 L.Ed.2d 664 (1978)], *we declined to "accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce."* 434 U.S. at 443, 54 L.Ed.2d 664, 98 S.Ct. 787. This "weighing" by a court requires—and indeed the constitutionality of the state regulation depends on—"a sensitive consideration of the weight and nature

> of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." Id., at 441, 54 L.Ed.2d 664, 98 S.Ct. 787; accord, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L.Ed.2d 174, 90 S.Ct. 844 (1970); *Bibb, supra*, at 525-530, 3 L.Ed.2d 1003, 79 S.Ct 962; *Southern Pacific, supra*, at 770, 89 L.Ed. 1915, 65 S.Ct. 1515. (..... U.S. at ....., 67 L.Ed.2d at 587, emphasis added, footnote omitted).

The situation is no different in the case at bar. The Washington Supreme Court erroneously concluded it need only satisfy itself that there was "some [putative] state benefit and that the means chosen reasonably further the state goal" (95 Wn.2d at 676), to free itself from the obligation to perform the balancing test required under the decisions of this Court. This argument was rejected in the *Kassel* case and should again be rejected here.

The balancing test has been discussed and imposed by this Court in cases involving a variety of factual situations. For example, in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 89 L.Ed. 1915 (1945), the Supreme Court found that an Arizona statute limiting the length of all passenger and freight trains operating in Arizona—including interstate trains—was an unconstitutional burden on interstate commerce. In reaching this ruling this Court stated:

> [T]he matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, *and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are safeguarded by the commerce clause from state interference.* (325 U.S. at 770-1, 89 L.Ed. at 1925, emphasis added)

Another example of weighing burden versus benefit took place in *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 3 L.Ed.2d 1003 (1959), in which the constitutionality of an Illinois statute requiring contour mudguards on all trucks and trailers passing through the state was tested. This Court considered evidence as to the burden and efficacy of the mudguards, and concluded the former outweighed the latter:

> A statute which insists on *a design out of line with the requirements of almost all the other states* may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device—out of line with the requirements of other states—may be so compelling that the innovative state need not be the one to give way. *But the present showing—balanced against the clear burden on commerce—is far too inconclusive to make this mudguard meet that test.* (359 U.S. at 529-30, 3 L.Ed.2d at 1010, emphasis added).

Again in *Pike v. Bruce Church*, 397 U.S. 137, 25 L.Ed.2d 174 (1970), this Court discussed this balancing test in determining the constitutionality of an Arizona statute requiring fruits and vegetables exported from the state to be crated in certain fashions. After reviewing the facts the Court found the Arizona law imposed a burden on interstate commerce "clearly excessive in relation to the putative local interests," and stated the applicable test to be as follows:

> If a legitimate local purpose is found, then *the question becomes one of degree*. And the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could be promoted as well with a lesser impact on interstate activities. (397 U.S. at 142, 25 L.Ed.2d at 178, emphasis added)

In *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 47 L.Ed.2d 55 (1976), the constitutionality of a Mississippi statute was

tested, again provoking a discussion of the balancing test. That case treated the question of whether Mississippi could constitutionally deny a Louisiana milk producer the right to sell milk in Mississippi which satisfied Mississippi health standards solely on the ground that Louisiana did not sign a reciprocity agreement permitting sales of Mississippi milk within Louisiana borders. In analyzing the facts before it the Court stated:

> [I]n areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in absence of congressional guidance is called upon to make *"delicate adjustment of the conflicting state and federal claims,"* . . . thereby attempting "the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce." . . . In undertaking this task the court, if it finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, is confronted with *a problem of balance.* (424 U.S. at 371, 47 L.Ed.2d at 60, citations omitted, emphasis added)

In response to Spiegel's argument below that these cases bound the court to perform the balancing test, the Washington Supreme Court sought to distinguish them, stating, "[T]he burden usually envisioned in the balancing cases relates to the actual instrumentalities of interstate commerce, *i.e.*, the mode of transportation that permits free physical flow of goods." (95 Wn.2d at 676) This reasoning is not even specious. To accept it is to hold the protection of the Commerce Clause extends not to what is undisputedly commerce itself—the interstate sale of goods on credit—but only to the vehicles employed to transport the goods themselves. Such an illogical distinction finds no support in the law nor in the Constitution in its simple dictate that,

"The Congress shall have the Power . . . to regulate Commerce among the several states."

The question presented here is indeed significant: is state regulation of interstate credit immune from judicial scrutiny under the Commerce Clause? If so, it will be in this area alone that incantation of a public policy purpose—declared insufficient to insulate a state law from Commerce Clause attack in *Kassel*—will allow a court to dispense with the need to examine the alleged benefit of the law as measured against the burden it inflicts on interstate commerce.

Should this Court exercise its jurisdiction in this case, it could on the record before it decide whether the 12% ceiling imposed by Washington on interstate credit sales is or is not constitutional. It need not reach that issue, however. Spiegel seeks only to have this case remanded to the trial court for judicial weighing of evidence on the issue of the burdens and benefits resulting from the application of the Washington statutes to interstate commerce.

CONCLUSION

The court should note probable jurisdiction of this appeal or summarily reverse and remand the decision below for a factual evaluation of the burden imposed by the regulation of interstate credit sales at issue herein.

Respectfully submitted,

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September 1, 1981

APPENDIX

[No. 47087-1. En Banc. February 11, 1981.]

GEORGE WHITAKER, ET AL, Respondents, v. SPIEGEL, INC., Appellant.

[1] Contracts - Validity - Public Policy. Terms of an agreement between private parties are subject to limitation or invalidation if they conflict with public policy.

[2] Usury - Conflict of Laws - Choice of Law - Application. A transaction found to be within the scope of the usury law (RCW 19.52) is subject to the provisions of the statute regardless of any expressed choice of law by the parties.

[3] Contracts - Nature of Transaction - Determination. In categorizing a transaction, the courts examine its substance without regard to its form.

[4] Sales - Time-Price Differential - Revolving Charge Accounts. A service

charge at a fixed rate of interest paid on the balance of indebtedness in a revolving charge account is not a time-price differential. Such a differential requires two fixed prices, a cash price and a time-sale price which includes a fixed service charge independent of the amount owed.

[5] Usury - Sales - Forbearance - Revolving Charge Accounts. A credit sale involving a charge account, in which the creditor refrains from demanding immediate payment upon furnishing goods, and the debtor, upon acceptance of the goods, agrees to pay for them and to also pay a fixed percentage service charge on his unpaid balance, is a forbearance and is subject to the usury law (RCW 19.52) (prospectively overruling Hafer v. Spaeth, 22 Wn.2d 378, insofar as it is inconsistent).

[6] Sales - Retail Installment Sales Act - Mail Order Charge Agreements - Application. Mail order charge agreements are subject to the disclosure requirements for retail charge agreements under the retail installment sales act (RCW 63.14.120).

[7] Statutes - Initiatives - Construction - Voters' Pamphlet. The collective intent of the people may be determined by examination of the voters' pamphlet when construing an enactment adopted by means of the initiative process.

[8] Sales - Retail Installment Sales Act - Service Charge Limitation - Purpose. The purpose of the limitation on service charges for various types of installment or revolving sales accounts found in RCW 63.14.130 is to ensure that the rate of interest

charged on any such account does not exceed 12 percent.

[9] Sales - Retail Installment Sales Act - Mail Order Charge Agreements - Place of Performance. For purposes of applying the retail installment sales act (RCW 63.14), the place of performance of a mail order charge agreement is where the customer accepts the goods, determines to retain them, and posts payment for them.

[10] Commerce - Interstate Commerce - Competing Benefits and Burdens - Comparable Interests. Resolution of competing interests, occasioned by the interference with interstate commerce by a state regulation, by weighing the burdens and benefits involved is not an appropriate method when the competing interests involved are not comparable.

[11] Commerce - Interstate Commerce - State Regulation - Burden of Proof. When a state regulation results in a benefit to the State which is not comparable with the burden it imposes upon interstate commerce, and no predominantly national concern is involved, a State need only establish that some benefit accrues from the regulation and that it is a reasonable means of furthering a state goal.

[12] Common Law - New Principle of Law - Prospective Application - Benefit of Lawsuit. A change in the common law may be applied to give the prevailing party to an action the benefit of its own lawsuit while otherwise limiting the change to a prospective application in order to protect existing agreements which justifiably relied upon the previous law.

Dore and Dimmick, JJ., did not participate in the disposition of this case.

Nature of Action: Certain revolving charge account customers of a mail order house brought an action on behalf of themselves and other credit customers seeking a declaration that certain practices of the retailer violated the usury, retail installment sales, and consumer protection acts.

Superior Court: The Superior Court for Spokane County, No. 235444, Richard P. Guy, J., on September 9, 1979, entered a summary judgment finding that Washington law was applicable, that the practices violated the usury and retail installment sales acts but not the Consumer Protection Act, and that application of the statutes did not discriminate against interstate commerce.

Supreme Court: Holding that the usury act applied regardless of the parties'

choice of law, that revolving charge accounts were subject to the usury and retail installment sales acts, and that regulation of such accounts was not an interference with interstate commerce, and noting that a violation of the usury act was a violation of the Consumer Protection Act, the court affirms the judgment but modifies it to include application of the Consumer Protection Act. The change in the common law applies to the parties but only prospectively applies to other transactions.

George, Hull & Porter, P.S., by T. Dennis George and Laurie D. Kohli, for appellant.

Richard B. Price and Smith, Brucker, Winn & Ehlert, by Thomas H.S. Brucker, for respondents.

Slade Gorton, Attorney General, Thomas L. Boeder, Senior Assistant, and

Jon P. Ferguson, Assistant, amici curiae for respondents.

[As amended by order of the Supreme Court June 4, 1981.]

WILLIAMS, J. - This case presents the question whether appellant Spiegel, Inc., a corporation which is in the business of selling goods by mail throughout the United States, may charge Washington customers a service charge rate of 19.8 percent per year (1.65 percent per month) on retail purchases made under a revolving charge agreement. The trial court concluded that the 19.8 percent rate violated provisions of several Washington statutes, and entered summary judgment for respondents George and Margaret Whitaker.

The findings of fact, which are not substantially disputed, disclose the following:

Appellant is a Delaware corporation with its principal offices in Chicago,

Illinois. Appellant is engaged nationwide in the mail order merchandising of retail consumer goods and products and solicits business in all 50 states. Although appellant has no offices in Washington, it has specifically solicited business from Washington residents on a continual basis by (1) mailings to Washington residents of merchandise catalogs and flier mailings addressed to specific persons; (2) advertising materials placed in monthly billing statements directed to Washington customers; and (3) in 1974 and 1975, newspaper advertisements.

The result of appellant's active solicitation of retail business from Washington residents has been the successful development of accounts receivable business. In 1974, appellant had an average of 31,048 Washington credit accounts and generated outstanding balances of $6,247,109. In 1975, there were on the

average 26,070 credit customers from whom appellant generated $5,568,836, and in 1976, there were on the average 20,787 customers from whom appellant generated $4,594,524.

Washington residents fill out a printed standard order form prepared by appellant and mail it to appellant in Illinois. The order form provides, among other things, that the Washington resident promises "to pay according to the contract terms set forth in your current catalogue". The printed order form also specifies that "all credit orders must be for $10.00, or more, and are subject to Spiegel credit approval". It further provides that if the customer orders additional merchandise after his or her initial order and has an unpaid balance in connection with such previous orders, any new orders are to be "added to the existing balance as one account." Until June 1976, appellant

charged a time-price differential service charge of 19.8 percent, a rate which is permissible under the law of Illinois. After June 1976, appellant reduced the rate to Washington customers to 12 percent.[1] Appellant's service charge rate was and is disclosed in its catalog.

Upon receipt of an order form from a Washington resident, appellant attempts to verify the credit rating for the Washington resident by, among other means, use of credit bureaus located in the state of Washington. After verifying credit, appellant fills the order and the goods are mailed to the Washington resident at his or her address. The goods may come from a warehouse located in Illinois, or the goods may be shipped directly from their places

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[1] Respondents do not dispute appellant's statement that is has accepted no new applications for charge accounts from Washington residents since lowering its service charge rate to 12 percent.

of manufacture, which are located throughout the United States. Appellant then directs bills from Illinois to Washington customers and receives payment from the customers through the mail.

In the course of its business dealings with Washington residents, appellant keeps track of delinquent accounts. This task is accomplished in part with the aid of collection agencies located in the state of Washington. However, although appellant sends the delinquent accounts to Washington collection agencies, the accounts are maintained in appellant's name and are not assigned to the collection agencies. The collection agencies handle the accounts "on Spiegel's behalf." To the extent the collection agencies are not successful, appellant seeks and relies upon the benefit of the Washington courts when it seeks legal recourse against delinquent debtors.

On behalf of themselves and all other credit customers of Spiegel who reside in Washington, respondents brought an action against appellant in November of 1976, claiming that appellant's 19.8 percent service charge rate violated RCW 63.14, the Washington retail installment sales act (RISA); RCW 19.52, the Washington usury act; RCW 19.86, the Washington Consumer Protection Act; and Const. art. 12, § 7.

In October 1978, appellant moved for a summary judgment of dismissal on the grounds that Washington law was inapplicable and that in the alternative, if Washington law was deemed applicable, the result violated the commerce clause, U.S. Const. art. 1, § 8, as it was an undue burden on and discriminated against interstate commerce. The trial court denied the motion, ruling that (a) Washington law was

applicable, (b) appellant's charge agreement violated RISA and the usury act, (c) appellant did not violate the Consumer Protection Act, (d) the question of whether appellant's conduct violated Const. art. 12, § 7 was moot, and (e) application of these laws did not constitute an undue burden on or discriminate against interstate commerce. The matter of class certification remains, pending resolution of this matter. We granted review pursuant to a motion to transfer from Division Three of the Court of Appeals.

This is not a case in which the law chosen by the parties to govern their rights is in doubt. See Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wn.2d 893, 899, 425 P.2d 623 (1967); Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 459 P.2d 32 (1969); Restatement (Second) of Conflict of Laws § 188 (1971). Appellant's order form contains

the following language in the clause above the signature line:

> I promise to pay according to the contract terms set forth in your current catalog and I understand the contract is to be governed by Illinois law . . .

Clerk's Papers, at 508.

[1] Generally, parties to a contract may determine the specific terms of the agreement, but the contract provisions are subject to limitation and invalidation if they contravene public policy. Mutual of Enumclaw Ins. Co. v. Wiscomb, 95 Wn.2d 373, 622 P.2d 1234 (1981); Giambattista v. National Bank of Commerce, 21 Wn. App. 723, 735, 586 P.2d 1180 (1978); see R. Weintraub, Conflict of Laws, § 7.3C (2d ed. 1980).

The Washington usury statute provides that 12 percent is the maximum rate that may be exacted "for the loan or forbearance

of any money". RCW 19.52.020. RCW 19.52.-005 declares that the policy of the state, as expressed by the legislature, is

> to protect the residents of this state from debts bearing burdensome interest rates; and in order to better effect the policy of this state to use this state's policies and courts to govern the affairs of our residents and the state; and in recognition of the duty to protect our citizens from oppression generally.

Indeed, our legislature views this policy as so fundamental as to include a choice of law provision extending the territorial application of the usury law to out-of-state contracts:

> Whenever a loan or forbearance is made outside Washington state to a person then residing in this state the usury laws found in chapter 19.52 RCW, as now or hereafter amended, shall be applicable in all courts of this state to the same extent such usury laws would be applicable if the loan or forbearnace was made in this state.

RCW 19.52.034.

[2] The legislative mandate is clear: In an interstate loan transaction, the

Washington courts are not free to engage in conflict of law analysis to determine whether or not the parties' own choice of law provision should apply. Rather, the legislature has directed that, in an action brought in Washington on an allegedly usurious transaction, Washington's usury law will apply if the debtor was a resident of Washington at the time the loan was made, even if the loan was made outside the state. See generally R. Weintraub, supra at 389-94; A. Ehrenzweig, Conflict of Laws 485-86 (1962); Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267, 271-79 (1966); Comment, Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris, 55 Cal. L. Rev. 123, 197-98 (1967). It follows that Washington's usury law, RCW 19.52, applies to the present transaction.

Appellant contends, however, that according to our old decision in Hafer v.

Spaeth, 22 Wn.2d 378, 156 P.2d 408 (1945), the service charge on its revolving charge accounts cannot be subject to the usury law. In Hafer, we defined usury as consisting of the following elements:

> (1) a loan or forbearance, express or implied; (2) money or its equivalent constituting the subject matter of the loan or forbearance; (3) an understanding between the parties that the principal shall be repayable absolutely; (4) the exaction of something in excess of what is allowed by law for the use of the money loaned or for the benefit of the forbearance; and, in some jurisdictions, (5) an intent to exact more than the legal maximum for the loan or forbearance.

Hafer, at 382-83.

In Hafer, the court held that conditional installment sales do not constitute a "loan or forbearance" and therefore do not meet all requisite elements of usury. Hafer, at 384-87. Appellant urges that Hafer disposes of the present case, in that the revolving charge accounts at issue here involve the same kind of deferred credit, and thus may not be defined as usury.

We have, however, questioned the continuing soundness of Hafer. In National Bank of Commerce v. Thomsen, 80 Wn.2d 406, 495 P.2d 332 (1972), we characterized an agreement between the purchaser of a car, the car dealer, and the National Bank of Commerce as a loan between the bank and the purchaser, and not as a conditional sales contract. Thus described, the transaction was held to be covered by the usury act. Although neither affirming nor overruling Hafer, we recognized that there was "respectable authority" for the proposition that a conditional sales agreement constitutes a loan or forbearance, and we left open, therefore, the possibility of a reconsideration of Hafer at some later date.

> If it is true that persons who purchase on installment terms automobiles and other items of merchandise which they feel they need are under economic pressure as severe as that which influences borrowers of money to accept oppressive terms, then there is

> no logical reason to make a distinction between the exacting of excessive charges for deferring payments and the exacting of such charges for loaning money.

National Bank of Commerce, at 411.

[3] In Hafer, at page 384, we defined forbearance as

> a contractual obligation of a lender or creditor to refrain, during a given period of time, from requiring the borrower or debtor to pay a loan or debt then due and payable.

(Italics ours.) We also stated that "the courts will [always] look through the form of the transaction and consider its substance." Hafer, at 383. See also State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

[4] Appellant argues that its service charge is a time-price diffeential, in which the service charge is merely the difference between the cash price and the installment price. We disagree. Essentially, a time-price agreement depends on the presentation of two prices

to the purchaser: a cash price and a time-sale price. J.C. Penney Co., at 148-49; Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 499, 110 N.W.2d 87 (1961). Under appellant's arrangement, the customer is not presented with two set prices, but rather is shown a cash price and a credit price consisting of the cash price coupled with a service charge percentage which remains constant against a fluctuating debt. The service charge is not a fixed amount independent of the amount owed, but rather is a percentage of a balance of indebtedness and is computed monthly upon the unpaid balance. This credit charge varies because even though the service charge rate remains constant, it is applied to a potentially increasing or decreasing balance. In a sense, each customer controls his or her own credit charge, for each has the ability to choose when to pay the entire obligation, thereby

eliminating the service charge. Thus, in any revolving charge account with appellant, there are not two set prices, and therefore it is not truly a time-price differential. J.C. Penney Co., at 141-50.

[5] We think appellant's revolving charge account constitutes a forbearance. The relationship between the respondents and appellant is clearly that of debtor and creditor. Respondents are indebted to appellant upon delivery of the goods and acceptance of them. Appellant, by its credit agreement, has agreed to refrain from immediately requiring respondents or any other debtors to pay their debts. In return, respondents have agreed to pay a constant service charge percentage which is applied against a changeable balance. Such an arrangement has been described as follows:

> Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price,

> the resulting product is interest. This is merely a sale for a cash price, with the difference between the money the buyer has and what he needs being financed.

Lloyd v. Gutgsell, 175 Neb. 775, 782, 124 N.W. 2d 198 (1963).

We are persuaded that the time is ripe to overrule Hafer; as the trial court noted, the view that usury laws do not apply to installment contracts has been subjected to much criticism. Warren, Regulation of Finance Charges in Retail Instalment Sales, 68 Yale L.J. 839, 843 (1959):

> Today, the belief that one borrows money from need but purchases on credit by choice is manifestly anachronistic. . . . If the usury laws were designed to protect weak and needy persons from the overreaching of economically superior renters of capital, then it should be recognized that the bargaining position of instalment buyers may be as disadvantageous as that of borrowers of money.

See also Bernstein, Background of a Gray Area in Law: The Checkered Career of Usury, 51 A.B.A.J. 846 (1965).

Moreover, this court itself expressed doubt as to Hafer's continuing validity in National Bank of Commerce v. Thomsen, supra. Accordingly, we hereby overrule Hafer v. Spaeth, supra, and hold that credit sales involving revolving charge accounts constitute a forbearance within the meaning of the usury statute. In so holding, we join a growing number of states. See State v. J.C. Penney Co., supra; Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957); Lloyd v. Gutgsell, supra; Rollinger v. J.C. Penney Co., 86 S.D. 154, 192 N.W.2d 699 (1971); State ex rel. Turner v. Younker Bros., Inc., 210 N.W.2d 550 (Iowa 1973); State ex rel. Meierhenry v. Spiegel, Inc., ___ S.D. ___, 277 N.W.2d 298, appeal dismissed, 444 U.S. 804, 62 L. Ed. 2d 17, 100 S. Ct. 25 (1979). See also Annot., Validity and construction of revolving charge account contract or plan,

41 A.L.R.3d 682 (1972); Annot., Advance in price for credit sale as compared with cash sale as usury, 14 A.L.R.3d 1065, 1128-43 (1967). Contra, Johnson v. Sears, Roebuck & Co., 14 Ill. App. 3d 838, 303 N.E.2d 627 (1973); Standard Oil Co. v. Williams, 153 Ind. App. 489, 288 N.E.2d 170 (1972); Overbeck v. Sears, Roebuck & Co., 169 Ind. App. 501, 349 N.E.2d 286 (1976); Sliger v. R.H. Macy & Co., 59 N.J. 465, 283 A.2d 904 (1971); Dennis v. Sears, Roebuck & Co., 223 Tenn. 415, 446 S.W.2d 260 (1969); see generally 14 A.L.R. 3d, supra.

In addition to the forbearance, does the present contract meet the other requirements for usury? Clearly, the forbearance is for money or its equivalent, which is the second element of usury. Hafer, at 382-83. As to the third element, it is evident from the agreement that the parties agreed that the principal should be

repaid absolutely. Fourth, the 19.8 percent interest rate is clearly in excess of what is permissible under our usury law. RCW 19.52.020. Finally, as to the fifth element, there is no argument that appellant did not intend to exact the rate of 19.8 percent, which is more than the legal maximum allowed under our usury law.[2]

The trial court found that appellant's mail order charge agreements were subject to RISA. The act applies to two types of retail installment transactions: retail installment contracts and retail charge agreements. A retail installment contract is defined as

> a contract, other than a retail charge agreement or an instrument

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[2]This conclusion is strengthened by Spiegel's admission at oral argument that it does not use an Illinois choice-of-law provision in agreements with customers who reside in states which permit service and interest charge rates closer to 19.8 percent.

> reflecting a sale made pursuant thereto, entered into or performed in this state for a retail installment transaction.

RCW 63.14.010(6).

A retail charge agreement is defined as

> an agreement entered into or performed in this state prescribing the terms of retail installment transactions which may be made thereunder from time to time and under the terms of which a service charge, as defined in this section, is to be computed in relation to the buyer's unpaid balance from time to time;

RCW 63.14.010(7). The maximum service charge which can be charged under either type of retail installment transaction is 12 percent per annum, or 1 percent per month. RCW 63.14.130.

Appellant argues that RISA is inapplicable since mail order charge agreements are not specifically mentioned in the statute whereas mail order installment contracts are specifically mentioned. RCW 63.14.060. According to appellant, this indicates that the legislature intended to

exclude mail order charge agreements from the entire act.

[6] This argument is unpersuasive. Mail order installment contracts are mentioned only in RCW 63.14.060, which exempts retail installment contracts based on catalog or other printed solicitations from the disclosure requirements for retail installment contracts mandated in RCW 63.14.040. Retail charge agreements, by contrast, are subject to the different disclosure requirements of RCW 63.14.120. It does not follow, however, that exempting mail order retail installment contracts from the installment contract reporting requirements must mean that the legislature intended to exclude mail order charge agreements from the coverage of the act.

[7] A second reason for rejecting this argument is that such an interpretation may run contrary to the purpose of RISA. In 1968, the voters of the state of

Washington passed Initiative 245 (Laws of 1969, ch. 2), which limited the service charge on retail installment transactions to 12 percent per year. Thus, although RISA does not contain a declaration of policy among its provisions, the court in determining the spirit and intent of the act may look to the material in the official voters' pamphlet which contained the text and an explanation of the proposed statute. Department of Revenue v. Hoppe, 82 Wn.2d 549, 512 P.2d 1094 (1973); Bayha v. PUD 1, 2 Wn.2d 85, 89, 97 P.2d 614 (1939).

The statement for Initiative 245 in the Official Voters Pamphlet of 1968 reads, in part, at page 8:

> Retail stores are charging 18% interest per year on "revolving charge accounts." . . . That's why Initiative 245 was filed. It rolls the rates back to 12%!

The explanatory comment to Initiative 245, issued by the Attorney General states:

> The proposed act would reduce the maximum amount which may be legally assessed as a service charge in connection with retail installment transactions from 18% per year to 12% per year computed monthly on the unpaid balance . . .

Official Voters Pamphlet 9 (1968).

[8] The purpose of RCW 63.14.130 is thus clear: It is to prevent the rate of interest charged on revolving charge accounts from exceeding 12 percent. To exclude mail order charge agreements from RISA's coverage, as appellant suggests, would defeat this purpose in a substantial number of cases.

[9] Appellant argues in addition that RCW 63.14.010(6) requires that a retail charge agreement be entered into or performed in Washington to make it subject to the act. Appellant contends that the contract was entered into in Illinois since each order form is subject to its credit approval. But the performance of the contract for the purpose of RISA takes

place in Washington at the time the customer accepts the goods, determines to keep them, and posts payment through a mail receptacle located here.[3]

Accordingly, we conclude that appellant's mail order charge agreements are subject to RISA. By exacting a 19.8 percent service charge from its Washington customers, appellant is clearly in violation of RISA. RCW 63.14.130.

The trial court also held that appellant's conduct did not violate the Consumer Protection Act, because there was no showing of unfair or deceptive trade practices

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[3]Spiegel cites Lawyers Coop. Publishing Co. v. Kuntz, 73 Wn.2d 674, 440 P.2d 813 (1968), as authority for its contention that the retail charge agreement is performed outside Washington. That case addressed the question whether a mail order publishing business was required to pay a corporate license fee to the State of Washington as a condition of maintaining a legal action in the Washington courts. The extent of the publisher's activites here, not the location of the parties' performance of the agreement, was the focus of the court's inquiry.

as required by RCW 19.86.020. Anhold v. Daniels, 94 Wn.2d 40, 614 P.2d 184 (1980). It is not necessary, however, for us to decide whether appellant has engaged in a deceptive trade practice, since the usury act expressly declares that the Consumer Protection Act is violated by the entry into a usurious contract:

> Entering into or transacting a usurious contract is hereby declared to be an unfair act or practice in the conduct of commerce for the purpose of the application of the consumer protection act found in chapter 19.86 RCW.

RCW 19.52.036.

The legislature has clearly expressed the policy that the protection of the consuming public is enhanced by permitting application of the Consumer Protection Act in those situations where consumers are faced with usurious contracts. Since we have found the present contract to fall under the usury statute, we therefore hold

the Consumer Protection Act is likewise applicable.

Appellant next contends that application of RISA and the usury statute both imposes an impermissible burden on interstate commerce and discriminates against out-of-state mail order businesses, therefore contravening the commerce clause of the United States Constitution, U.S. Const. art. 1, § 8.

The purpose of the commerce clause is to prevent tc imposition of state policies on those who lack political representation within the state. See L. Tribe, American Constitutional Law 327 (1978). The framers intended to avoid the "economic Balkanization" of commerce by assuring "to the commercial enterprises in every state substantial equality of access to a free national market. It was not meant to usurp the police power of the states which was reserved under the Tenth Amendment."

American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 628-29, 517 P.2d 691 (1973).

Appellant concedes that economic hardship in itself is not sufficient to invalidate as unconstitutional a state regulation affecting interstate commerce. See American Can Co., at 638; Exxon Corp. v. Governor, 437 U.S. 117, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978). Pointing to evidence in the record that the burden on appellant is "prohibitive", appellant nevertheless urges us to weigh the competing interests, which, it is contended, will show that the economic hardship is entirely unreasonable when balanced against the State's interest in protecting its citizens from usurious contracts.

[10] The judicial weighing of burdens and benefits has ordinarily been undertaken only when there are comparable interests. See, e.g., the transporation cases, Bibb v.

Navajo Freight Lines, Inc., 359 U.S. 520, 2 L. Ed. 2d 1003, 79 S. Ct. 962 (1959), and Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945); and the health inspection cases, Dean Milk Co. v. Madison, 340 U.S. 349, 95 L. Ed. 329, 71 S. Ct. 295 (1951); Minnesota v. Barber, 136 U.S. 313, 34 L. Ed. 455, 10 S. Ct. 862 (1890); American Can Co., at 631. But where the competing interests are not comparable, the judiciary does not engage in a weighing process. Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129, 21 L. Ed. 2d 289, 89 S. Ct. 323 (1968); Construction Indus. Ass'n v. Petaluma, 522 F.2d 897, 909 (9th Cir. 1975), cert. denied, 424 U.S. 934, 47 L. Ed. 2d 342, 96 S. Ct. 1148 (1976).

Moreover, the burden usually envisioned in the balancing cases relates to the actual instrumentalities of interstate

commerce, i.e., the mode of transportation that permits free physical flow of goods. American Can Co., at 637; Southern Pac. Co. v. Arizona ex rel. Sullivan, supra; Bibb v. Navajo Freight Lines, Inc., supra.

> There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

Southern Pac. Co., at 770.

[11] Thus, where the claimed state benefit and the impact upon interstate commerce are grossly disproportionate, the disparity is apparent without undertaking a balancing process. In the absence of "predominant national concern", the state need only establish that there is some state benefit and that the means chosen reasonably furthers the state goal. American Can Co., at 632; Construction Indus.

Ass'n, at 909. Clearly, the benefit envisioned by our legislature, made explicit in the usury act, RCW 19.52.005, is to protect Washington citizens from unreasonably high interest rates. In addition, RISA's statutory interest ceiling enacted by voter initiative clearly furthers that goal.

Appellant argues, however, that Washington's 12 percent ceiling on interest rates unconstitutionally discriminates against out-of-state sellers, which is likewise barred by the commerce clause. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). But the usury statute and RISA treat all mail order and other retail sellers alike. A Washington mail order house doing business here would face the same marketing problems as an interstate seller with respect to the 12 percent interest ceiling. Local retail

sellers in Washington may charge only 12 percent interest in their credit dealings, and appellant is merely required to adhere to this same equally applicable rate. American Can Co., at 642; Aldens, Inc. v. Packel, 524 F.2d 38, 46-47 (3d Cir. 1975); State ex rel. Meierhenry v. Spiegel, Inc., ___ S.D. ___, 277 N.W. 2d 298, 301-02 (1979). We find no discrimination.

[12] The last question we must decide is whether our decision should have a retroactive effect. In light of the impact on presently existing agreements entered into over many years in reliance on the usury statute, RCW 19.52, as construed in Hafer v. Spaeth, 22 Wn.2d 378, 156 P.2d 408 (1945), we think justice requires that this decision be applied prospectively only, except for a limited retroactive application to the parties in this case.

Courts may give a party the benefit of its own lawsuit, where the party has

prevailed in its contention that the old law should be overruled. Cascade Security Bank v. Butler, 88 Wn.2d 777, 784, 567 P.2d 631 (1977). However, "[a]ppellate courts possess the power to give their decisions prospective effect, i.e., not to apply the decision to the parties in the overruling case." Cascade Security Bank, at 785. If a party has justifiably relied on the overruled case, we must decide whether a retroactive application of the overruling decision would defeat these reliance interests. Geise v. Lee, 10 Wn. App. 728, 732-33, 519 P.2d 1005 (1974), rev'd on other grounds, 84 Wn.2d 866, 528 P.2d 1054 (1975).

Over the years since the Hafer decision, there have been untold numbers of transactions in reliance on that decision. Indeed, the Attorney General has recently published an opinion advising that the usury statute did not apply to installment

sales of real property and relying on Hafer. Attorney General Opinion, May 20, 1980. It would be unfair now to give our decision a general retroactive effect and expose well meaning vendors to the consequences of charging interest that has become usurious as a result of this decision. Thus, as to all affected persons not parties to this lawsuit, the decision will apply prospectively only from the date of filing.

As to the parties herein, however, there has been no reliance on Hafer. Respondents, the prevailing parties, urged that Hafer be overruled, as we have done. Spiegel has never relied on Hafer, since it at all times during this litigation insisted that Illinois law applied to the subject transactions. As a result, it has suffered no hardship occasioned by its reliance on Hafer. Accordingly, the decision is given limited retroactive

effect as to the parties to this lawsuit only. Cascade Security Bank v. Butler, supra; Taskett v. KING Broadcasting Co., 86 Wn.2d 439, 546 P.2d 81 (1976).

Since we hold that Washington law applies, respondents' argument that appellant's activities in Washington violate Const. art. 12, § 7 is rendered moot. The judgment of the trial court is affirmed as modified on the question of the applicability of the Consumer Protection Act.

BRACHTENBACK, C.J., and ROSELLINI, STAFFORD, UTTER, DOLLIVER, and HICKS, JJ., concur.

Reconsideration denied June 4, 1981.

[No. 47087-1. En Banc. Feb. 11, 1981.]

GEORGE WHITAKER, ET AL, Respondents, v. SPIEGEL, INC., Appellant.

[1] Contracts - Validity - Public Policy. Terms of an agreement between private parties are subject to limitation or invalidation if they conflict with public policy.

[2] Usury - Conflict of Laws - Choice of Law - Application. A transaction found to be within the scope of the usury law (RCW 19.52) is subject to the provisions of the statute regardless of any expressed choice of law by the parties.

[3] Contracts - Nature of Transaction - Determination. In categorizing a transaction, the courts examine its substance without regard to its form.

[4] Sales - Time-Price Differential - Revolving Charge Accounts. A service

charge at a fixed rate of interest paid on the balance of indebtedness in a revolving charge account is not a time-price differential. Such a differential requires two fixed prices, a cash price and a time-sale price which includes a fixed service charge independent of the amount owed.

[5] Usury - Sales - Forbearance - Revolving Charge Accounts. A credit sale involving a charge account, in which the creditor refrains from demanding immediate payment upon furnishing goods, and the debtor, upon acceptance of the goods, agrees to pay for them and to also pay a fixed percentage service charge on his unpaid balance, is a forbearance and is subject to the usury law (RCW 19.52) (prospectively overruling Hafer v. Spaeth, 22 Wn.2d 378, insofar as it is inconsistent).

[6] Sales - Retail Installment Sales Act - Mail Order Charge Agreements - Application. Mail order charge agreements are subject to the disclosure requirements for retail charge agreements under the retail installment sales act (RCW 63.14.120).

[7] Statutes - Initiatives - Construction - Voters' Pamphlet. The collective intent of the people may be determined by examination of the voters' pamphlet when construing an enactment adopted by means of the initiative process.

[8] Sales - Retail Installment Sales Act - Service Charge Limitation - Purpose. The purpose of the limitation on service charges for various types of installment or revolving sales accounts found in RCW 63.14.130 is to ensure that the rate of interest

charged on any such account does not exceed 12 percent.

[9] Sales - Retail Installment Sales Act - Mail Order Charge Agreements - Place of Performance. For purposes of applying the retail installment sales act (RCW 63.14), the place of performance of a mail order charge agreement is where the customer accepts the goods, determines to retain them, and posts payment for them.

[10] Commerce - Interstate Commerce - Competing Benefits and Burdens - Comparable Interests. Resolution of competing interests, occasioned by the interference with interstate commerce by a state regulation, by weighing the burdens and benefits involved is not an appropriate method when the competing interests involved are not comparable.

[11] Commerce - Interstate Commerce - State Regulation - Burden of Proof. When a state regulation results in a benefit to the State which is not comparable with the burden it imposes upon interstate commerce, and no predominantly national concern is involved, a State need only establish that some benefit accrues from the regulation and that it is a reasonable means of furthering a state goal. Dore and Dimmick, JJ., did not participate in the disposition of this case.

Nature of Action: Certain revolving charge customers of a mail order house brought an action on behalf of themselves and other credit customers seeking a declaration that certain practices of the retailer violated the usury, retail installment sales, and consumer protection acts.

Superior Court: The Superior Court for Spokane County, No. 235444, Richard P. Guy, J., on September 9, 1979, entered a summary judgment finding that Washington law was applicable, that the practices violated the usury and retail installment sales acts but not the Consumer Protection Act, and that application of the statutes did not discriminate against interstate commerce.

Supreme Court: Holding that the usury act applied regardless of the parties' choice of law, that revolving charge accounts were subject to the usury and retail installment sales acts, and that regulation of such accounts was not an interference with interstate commerce, and noting that a violation of the usury act was a violation of the Consumer Protection Act, the court affirms the judgment but modifies it to include application of the Consumer Protection Act.

George, Hull & Porter, P.S., by T. Dennis George and Laurie D. Kohli, for appellant.

Richard B. Price and Smith, Brucker, Winn & Ehlert, by Thomas H.S. Brucker, for respondents.

Slade Gorton, Attorney General, Thomas L. Boeder, Senior Assistant, and Jon P. Ferguson, Assistant, amici curiae.

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

GEORGE WHITAKER and MARGARET C. WHITAKER, and ALL OTHER PERSONS SIMILARLY SITUATED SINCE DECEMBER 5, 1968, Respondents,	)	No. 47087-1 En Banc
v.	)	
SPIEGEL, INC., a foreign corporation, Appellant.	)	Filed Feb. 11 1981

This case presents the question whether appellant Spiegel, Inc., a corporation which is in the business of selling goods by mail throughout the United States, may charge Washington customers a service charge rate of 19.8 percent per year (1.65 percent per month) on retail purchases made under a revolving charge agreement. The trial court concluded that the 19.8 percent rate violated provisions of several Washington statutes, and entered summary judgment for respondents George and Margaret Whitaker.

The findings of fact, which are not substantially disputed, disclose the following:

Appellant is a Delaware corporation with its principal offices in Chicago, Illinois. Appellant is engaged nationwide in the mail order merchandising of retail consumer goods and products and solicits business in all 50 states. Although appellant has no offices in Washington, it has specifically solicited business from Washington residents on a continual basis by (1) mailings to Washington residents of merchandise catalogs and flier mailings addressed to specific persons; (2) advertising materials placed in monthly billing statements directed to Washington customers; and (3) in 1974 and 1975, newspaper advertisements.

The result of appellant's active solicitation of retail business from

Washington residents has been the successful development of accounts receivable business. In 1974, appellant had an average of 31,048 Washington credit accounts and generated outstanding balances of $6,247,109. In 1975, there were on the average 26,070 credit customers from whom appellant generated $5,568,836, and in 1976, there were on the average 20,787 customers from whom appellant generated $4,594,524.

Washington residents fill out a printed standard order form prepared by appellant and mail it to appellant in Illinois. The order form provides, among other things, that the Washington resident promises "to pay according to the contract terms set forth in your current catalogue". The printed order form also specifies that "all credit orders must be for $10.00, or more, and are subject to Spiegel credit approval". It further provides that if the

customer orders additional merchandise after his or her initial order and has an unpaid balance in connection with such previous orders, any new orders are to be "added to the existing balance as one account." Until June 1976, appellant charged a time-price differential service charge of 19.8 percent, a rate which is permissible under the law of Illinois. After June 1976, appellant reduced the rate to Washington customers to 12 percent.[1] Appellant's service charge rate was and is disclosed in its catalog.

Upon receipt of an order form from a Washington resident, appellant attempts to verify the credit rating for the Washington resident by, among other means, use of

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[1]Respondents do not dispute appellant's statement that is has accepted no new applications for charge accounts from Washington residents since lowering its service charge rate to 12 percent.

credit bureaus located in the state of Washington. After verifying credit, appellant fills the order and the goods are mailed to the Washington resident at his or her address. The goods may come from a warehouse located in Illinois, or the goods may be shipped directly from their places of manufacture, which are located throughout the United States. Appellant then directs bills from Illinois to Washington customers and receives payment from the customers through the mail.

In the course of its business dealings with Washington residents, appellant keeps track of delinquent accounts. This task is accomplished in part with the aid of collection agencies located in the state of Washington. However, although appellant sends the delinquent accounts to Washington collection agencies, the accounts are maintained in appellant's name and are not assigned to the collection agencies. The

collection agencies handle the accounts "on Spiegel's behalf." To the extent the collection agencies are not successful, appellant seeks and relies upon the benefit of the Washington courts when it seeks legal recourse against delinquent debtors.

On behalf of themselves and all other credit customers of Spiegel who reside in Washington, respondents brought an action against appellant in November of 1976, claiming that appellant's 19.8 percent service charge rate violated RCW 63.14, the Washington retail installment sales act (RISA); RCW 19.52, the Washington usury act; RCW 19.86, the Washington Consumer Protection Act; and Const. art. 12, § 7.

In October 1978, appellant moved for a summary judgment of dismissal on the grounds that Washington law was inapplicable and that in the alternative, if Washington law was deemed applicable, the

result violated the commerce clause, U.S. Const. art. 1, § 8, as it was an undue burden on and discriminated against interstate commerce. The trial court denied the motion, ruling that (a) Washington law was applicable, (b) appellant's charge agreement violated RISA and the usury act, (c) appellant did not violate the Consumer Protection Act, (d) the question of whether appellant's conduct violated Const. art. 12, § 7 was moot, and (e) application of these laws did not constitute an undue burden on or discriminate against interstate commerce. The matter of class certification remains, pending resolution of this matter. We granted review pursuant to a motion to transfer from Division Three of the Court of Appeals.

This is not a case in which the law chosen by the parties to govern their rights is in doubt. See Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wn.2d

893, 899, 425 P.2d 623 (1967); Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 459 P.2d 32 (1969); Restatement (Second) of Conflict of Laws § 188 (1971). Appellant's order form contains the following language in the clause above the signature line:

> I promise to pay according to the contract terms set forth in your current catalog and I understand the contract is to be governed by Illinois law . . .

Clerk's Papers, at 508.

Generally, parties to a contract may determine the specific terms of the agreement, but the contract provisions are subject to limitation and invalidation if they contravene public policy. Mutual of Enumclaw Ins. Co. v. Wiscomb, Wn.2d , P.2d (1981); Giambattista v. National Bank of Commerce, 21 Wn. App. 723, 735, 586 P.2d 1180 (1978); see R. Weintraub, Conflict of Laws, § 7.3C (2d ed. 1980).

The Washington usury statute provides that 12 percent is the maximum rate that may be exacted "for the loan or forbearnace of any money". RCW 19.52.020. RCW 19.52.-005 declares that the policy of the state, as expressed by the legislature, is

> to protect the residents of this state from debts bearing burdensome interest rates; and in order to better effect the policy of this state to use this state's policies and courts to govern the affairs of our residents and the state; and in recognition of the duty to protect our citizens from oppression generally.

Indeed, our legislature views this policy as so fundamental as to include a choice of law provision extending the territorial application of the usury law to out-of-state contracts:

> Whenever a loan or forbearance is made outside Washington state to a person then residing in this state the usury laws found in chapter 19.52 RCW, as now or hereafter amended, shall be applicable in all courts of this state to the same extent such usury laws would be applicable if the loan or forbearnace was made in this state.

RCW 19.52.034.

The legislative mandate is clear: In an interstate loan transaction, the Washington courts are not free to engage in conflict of law analysis to determine whether or not the parties' own choice of law provision should apply. Rather, the legislature has directed that, in an action brought in Washington on an allegedly usurious transaction, Washington's usury law will apply, even if the loan was made outside Washington to a Washington resident. See generally R. Weintraub, supra at 389-94; A. Ehrenzweig, Conflict of Laws 485-86 (1962); Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267, 271-79 (1966); Comment, Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris, 55 Cal. L. Rev. 123, 197-98 (1967). It follows that Washington's usury law, RCW 19.52, applies to the present transaction.

Appellant contends, however, that according to our old decision in Hafer v. Spaeth, 22 Wn.2d 378, 156 P.2d 408 (1945), the service charge on its revolving charge accounts cannot be subject to the usury law. In Hafer, we defined usury as consisting of the following elements:

> (1) a loan or forbearance, express or implied; (2) money or its equivalent constituting the subject matter of the loan or forbearance; (3) an understanding between the parties that the principal shall be repayable absolutely; (4) the exaction of something in excess of what is allowed by law for the use of the money loaned or for the benefit of the forbearance; and, in some jurisdictions, (5) an intent to exact more than the legal maximum for the loan or forbearance.

Hafer, at 382-83.

In Hafer, the court held that conditional installment sales do not constitute a "loan or forbearance" and therefore do not meet all requisite elements of usury. Hafer, at 384-87. Appellant urges that Hafer disposes of the present case, in that the revolving charge accounts at issue here

involve the same kind of deferred credit, and thus may not be defined as usury.

We have, however, questioned the continuing soundness of Hafer. In National Bank of Commerce v. Thomsen, 80 Wn.2d 406, 495 P.2d 332 (1972), we characterized an agreement between the purchaser of a car, the car dealer, and the National Bank of Commerce as a loan between the bank and the purchaser, and not as a conditional sales contract. Thus described, the transaction was held to be covered by the usury act. Although neither affirming nor overruling Hafer, we recognized that there was "respectable authority" for the proposition that a conditional sales agreement constitutes a loan or forbearance, and we left open, therefore, the possibility of a reconsideration of Hafer at some later date.

> If it is true that persons who purchase on installment terms automobiles and other items of merchandise which

> they feel they need are under economic pressure as severe as that which influences borrowers of money to accept oppressive terms, then there is no logical reason to make a distinction between the exacting of excessive charges for deferring payments and the exacting of such charges for loaning money.

National Bank of Commerce, at 411.

In Hafer, at page 384, we defined forbearance as

> a contractual obligation of a lender or creditor to refrain, during a given period of time, from requiring the borrower or debtor to pay a loan or debt then due and payable.

(Italics ours.) We also stated that "the courts will [always] look through the form of the transaction and consider its substance." Hafer, at 383. See also State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

Appellant argues that its service charge is a time-price diffeential, in which the service charge is merely the difference between the cash price and the installment price. We disagree.

Essentially, a time-price agreement depends on the presentation of two prices to the purchaser: a cash price and a time-sale price. J.C. Penney Co., at 148-49; Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 499, 110 N.W.2d 87 (1961). Under appellant's arrangement, the customer is not presented with two set prices, but rather is shown a cash price and a credit price consisting of the cash price coupled with a service charge percentage which remains constant against a fluctuating debt. The service charge is not a fixed amount independent of the amount owed, but rather is a percentage of a balance of indebtedness and is computed monthly upon the unpaid balance. This credit charge varies because even though the service charge rate remains constant, it is applied to a potentially increasing or decreasing balance. In a sense, each customer controls his or her own credit

charge, for each has the ability to choose when to pay the entire obligation, thereby eliminating the service charge. Thus, in any revolving charge account with appellant, there are not two set prices, and therefore it is not truly a time-price differential. J.C. Penney Co., at 141-50.

We think appellant's revolving charge account constitutes a forbearance. The relationship between the respondents and appellant is clearly that of debtor and creditor. Respondents are indebted to appellant upon delivery of the goods and acceptance of them. Appellant, by its credit agreement, has agreed to refrain from immediately requiring respondents or any other debtors to pay their debts. In return, respondents have agreed to pay a constant service charge percentage which is applied against a changeable balance. Such an arrangement has been described as follows:

> Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest. This is merely a sale for a cash price, with the difference between the money the buyer has and what he needs being financed.

Lloyd v. Gutgsell, 175 Neb. 775, 782, 124 N.W. 2d 198 (1963).

We are persuaded that the time is ripe to overrule Hafer; as the trial court noted, the view that usury laws do not apply to installment contracts has been subjected to much criticism. Warren, Regulation of Finance Charges in Retail Instalment Sales, 68 Yale L.J. 839, 843 (1959):

> Today, the belief that one borrows money from need but purchases on credit by choice is manifestly anachronistic. . . . If the usury laws were designed to protect weak and needy persons from the overreaching of economically superior renters of capital, then it should be recognized that the bargaining position of instalment buyers may be as disadvantageous as that of borrowers of money.

See also Bernstein, Background of a Gray Area in Law: The Checkered Career of Usury, 51 A.B.A.J. 846 (1965).

Moreover, this court itself expressed doubt as to Hafer's continuing validity in National Bank of Commerce v. Thomsen, supra. Accordingly, we hereby overrule Hafer v. Spaeth, supra, and hold that credit sales involving revolving charge accounts constitute a forbearance within the meaning of the usury statute. In so holding, we join a growing number of states. See State v. J.C. Penney Co., supra; Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957); Lloyd v. Gutgsell, supra; Rollinger v. J.C. Penney Co., 86 S.D. 154, 192 N.W.2d 699 (1971); State ex rel. Turner v. Younker Bros., Inc., 210 N.W.2d 550 (Iowa 1973); State ex rel. Meierhenry v. Spiegel, Inc., ___ S.D. ___, 277 N.W.2d 298, appeal dismissed, 444 U.S. 804, 62

L. Ed. 2d 17, 100 S. Ct. 25 (1979). See also Annot., Validity and Construction of Revolving Charge Account Contract or Plan, 41 A.L.R. 3d 682 (1972); Annot., Advance in Price for Credit Sale as Compared with Cash Sale as Usury, 14 A.L.R.3d 1065, 1128-43 (1967). Contra, Johnson v. Sears, Roebuck & Co., 14 Ill. App. 3d 838, 303 N.E.2d 627 (1973); Standard Oil Co. v. Williams, 153 Ind. App. 489, 288 N.E.2d 170 (1972); Overbeck v. Sears, Roebuck & Co., 169 Ind. App. 501, 349 N.E.2d 286 (1976); Sliger v. R.H. Macy & Co., 59 N.J. 465, 283 A.2d 904 (1971); Dennis v. Sears, Roebuck & Co., 223 Tenn. 415, 446 S.W.2d 260 (1969); see generally 14 A.L.R. 3d, supra.

In addition to the forbearance, does the present contract meet the other requirements for usury? Clearly, the forbearance is for money or its equivalent, which is the second element of usury.

Hafer, at 382-83. As to the third element, it is evident from the agreement that the parties agreed that the principal should be repaid absolutely. Fourth, the 19.8 percent interest rate is clearly in excess of what is permissible under our usury law. RCW 19.52.020. Finally, as to the fifth element, there is no argument that appellant did not intend to exact the rate of 19.8 percent, which is more than the legal maximum allowed under our usury law.[2]

The trial court found that appellant's mail order charge agreements were subject to RISA. The act applies to two types of retail installment transactions: retail installment contracts and retail charge agreements. A retail installment contract is defined as

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[2]This conclusion is strengthened by Spiegel's admission at oral argument that it does not use an Illinois choice-of-law provision in agreements with customers who reside in states which permit service and interest charge rates closer to 19.8 percent.

> a contract, other than a retail charge agreement or an instrument reflecting a sale made pursuant thereto, entered into or performed in this state for a retail installment transaction.

RCW 63.14.010(6).

A retail charge agreement is defined as

> an agreement entered into or performed in this state prescribing the terms of retail installment transactions which may be made thereunder from time to time and under the terms of which a service charge, as defined in this section, is to be computed in relation to the buyer's unpaid balance from time to time;

RCW 63.14.010(7). The maximum service charge which can be charged under either type of retail installment transaction is 12 percent per annum, or 1 percent per month. RCW 63.14.130.

Appellant argues that RISA is inapplicable since mail order charge agreements are not specifically mentioned in the statute whereas mail order installment contracts are specifically mentioned. RCW 63.14.060. According to appellant, this

indicates that the legislature intended to exclude mail order charge agreements from the entire act.

This argument is unpersuasive. Mail order installment contracts are mentioned only in RCW 63.14.060, which exempts retail installment contracts based on catalog or other printed solicitations from the disclosure requirements for retail installment contracts mandated in RCW 63.14.040. Retail charge agreements, by contrast, are subject to the different disclosure requirements of RCW 63.14.120. It does not follow, however, that exempting mail order retail installment contracts from the installment contract reporting requirements must mean that the legislature intended to exclude mail order charge agreements from the coverage of the act.

A second reason for rejecting this argument is that such an interpretation may run contrary to the purpose of RISA.

In 1968, the voters of the state of Washington passed Initiative 245 (Laws of 1969, ch. 2), which limited the service charge on retail installment transactions to 12 percent per year. Thus, although RISA does not contain a declaration of policy among its provisions, the court in determining the spirit and intent of the act may look to the material in the official voters' pamphlet which contained the text and an explanation of the proposed statute. Department of Revenue v. Hoppe, 82 Wn.2d 549, 512 P.2d 1094 (1973); Bayha v. PUD 1, 2 Wn.2d 85, 89, 97 P.2d 614 (1939).

The statement for Initiative 245 in the Official Voters Pamphlet of 1968 reads, in part, at page 8:

> Retail stores are charging 18% interest per year on "revolving charge accounts." . . . That's why Initiative 245 was filed. It rolls the rates back to 12%!

The explanatory comment to Initiative 245, issued by the Attorney General states:

> The proposed act would reduce the maximum amount which may be legally assessed as a service charge in connection with retail installment transactions from 18% per year to 12% per year computed monthly on the unpaid balance . . .

Official Voters Pamphlet of 1968, at 9.

The purpose of RCW 63.14.130 is thus clear: It is to prevent the rate of interest charged on revolving charge accounts from exceeding 12 percent. To exclude mail order charge agreements from RISA's coverage, as appellant suggests, would defeat this purpose in a substantial number of cases.

Appellant argues in addition that RCW 63.14.010(6) requires that a retail charge agreement be entered into or performed in Washington to make it subject to the act. Appellant contends that the contract was entered into in Illinois since each order form is subject to its credit

approval. But the performance of the contract for the purpose of RISA takes place in Washington at the time the customer accepts the goods, determines to keep them, and posts payment through a mail receptacle located here.[3]

Accordingly, we conclude that appellant's mail order charge agreements are subject to RISA. By exacting a 19.8 percent service charge from its Washington customers, appellant is clearly in violation of RISA. RCW 63.14.130.

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[3]Spiegel cites Lawyers Coop. Publishing Co. v. Kuntz, 73 Wn.2d 674, 440 P.2d 813 (1968), as authority for its contention that the retail charge agreement is performed outside Washington. That case addressed the question whether a mail order publishing business was required to pay a corporate license fee to the State of Washington as a condition of maintaining a legal action in the Washington courts. The extent of the publisher's activites here, not the location of the parties' performance of the agreement, was the focus of the court's inquiry.

The trial court also held that appellant's conduct did not violate the Consumer Protection Act, because there was no showing of unfair or deceptive trade practices as required by RCW 19.86.020. Anhold v. Daniels, 94 Wn.2d 40, 614 P.2d 184 (1980). It is not necessary, however, for us to decide whether appellant has engaged in a deceptive trade practice, since the usury act expressly declares that the Consumer Protection Act is violated by the entry into a usurious contract:

> Entering into or transacting a usurious contract is hereby declared to be an unfair act or practice in the conduct of commerce for the purpose of the application of the consumer protection act found in chapter 19.86 RCW.

RCW 19.52.036.

The legislature has clearly expressed the policy that the protection of the consuming public is enhanced by permitting application of the Consumer Protection Act in those situations where consumers are

faced with usurious contracts. Since we have found the present contract to fall under the usury statute, we therefore hold the Consumer Protection Act is likewise applicable.

Appellant next contends that application of RISA and the usury statute both imposes an impermissible burden on interstate commerce and discriminates against out-of-state mail order businesses, therefore contravening the commerce clause of the United States Constitution, U.S. Const. art. 1, § 8.

The purpose of the commerce clause is to prevent to imposition of state policies on those who lack political representation within the state. See L. Tribe, American Constitutional Law 327 (1978). The framers intended to avoid the "economic Balkanization" of commerce by assuring "to the commercial enterprises in every state substantial equality of access to a free

national market. It was not meant to usurp the police power of the states which was reserved under the Tenth Amendment." American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 628-29, 517 P.2d 691 (1973).

Appellant concedes that economic hardship in itself is not sufficient to invalidate as unconstitutional a state regulation affecting interstate commerce. See American Can Co., at 638; Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978). Pointing to evidence in the record that the burden on appellant is "prohibitive", appellant nevertheless urges us to weigh the competing interests, which, it is contended, will show that the economic hardship is entirely unreasonable when balanced against the State's interest in protecting its citizens from usurious contracts.

The judicial weighing of burdens and benefits has ordinarily been undertaken only when there are comparable interests. See, e.g., the transporation cases, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 2 L. Ed. 2d 1003, 79 S. Ct. 962 (1959), and Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945); and the health inspection cases, Dean Milk Co. v. Madison, 340 U.S. 349, 95 L. Ed. 329, 71 S. Ct. 295 (1951); Minnesota v. Barber, 136 U.S. 313, 34 L. Ed. 455, 10 S. Ct. 862 (1890); American Can Co., at 631. But where the competing interests are not comparable, the judiciary does not engage in a weighing process. Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129, 21 L. Ed. 2d 289, 89 S. Ct. 323 (1968); Construction Indus. Ass'n v. Petaluma, 522 F.2d 897, 909 (9th Cir. 1975), cert.

denied, 424 U.S. 934, 47 L. Ed. 2d 342, 96 S. Ct. 1148 (1976).

Moreover, the burden usually envisioned in the balancing cases relates to the actual instrumentalities of interstate commerce, i.e., the mode of transportation that permits free physical flow of goods. American Can Co., at 637; Southern Pac. Co. v. Arizona ex rel. Sullivan, supra; Bibb v. Navajo Freight Lines, Inc., supra.

> There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

Southern Pac. Co., at 770.

Thus, where the claimed state benefit and the impact upon interstate commerce are grossly disproportionate, the disparity is apparent without undertaking a balancing process. In the absence of "predominant

national concern", the state need only establish that there is some state benefit and that the means chosen reasonably furthers the state goal. American Can Co., at 632; Construction Indus. Ass'n, at 909. Clearly, the benefit envisioned by our legislature, made explicit in the usury act, RCW 19.52.005, is to protect Washington citizens from unreasonably high interest rates. In addition, RISA's statutory interest ceiling enacted by voter initiative clearly furthers that goal.

Appellant argues, however, that Washington's 12 percent ceiling on interest rates unconstitutionally discriminates against out-of-state sellers, which is likewise barred by the commerce clause. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). But the usury statute and RISA treat all mail order and other retail sellers alike. A Washington

mail order house doing business here would face the same marketing problems as an interstate seller with respect to the 12 percent interest ceiling. Local retail sellers in Washington may charge only 12 percent interest in their credit dealings, and appellant is merely required to adhere to this same equally applicable rate. American Can Co., at 642; Aldens, Inc. v. Packel, 524 F.2d 38, 46-47 (3d Cir. 1975); State ex rel. Meierhenry v. Spiegel, Inc., ___ S.D. ___, 277 N.W. 2d 298, 301-02 (1979). We find no discrimination.

Since we hold that Washington law applies, respondents' argument that appellant's activities in Washington violate Const. art. 12, § 7 is rendered moot. The judgment of the trial court is affirmed as

modified on the question of the applicability of the Consumer Protection Act.

s/ Williams, J.

We concur:

s/ Brachtenbach, C.J.

s/ Rosellini, J.

s/ Stafford, J.

s/ Dolliver, J.

s/ Utter, J.

s/ Hicks, J.

RECEIVED Aug 30, 1979
GEORGE, HULL & PORTER, P.S.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

GEORGE WHITAKER, ET us, et al., Plaintiffs, vs. SPIEGEL, INC., a foreign corporation, Defendant	NO. 235444 ORDER: (1) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND (2) ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW, (3) ENTERING SUMMARY JUDGMENT FOR PLAINTIFFS

This matter having come on before the above-entitled court on the 29th day of June, 1979 on defendant's motion for summary judgment with the plaintiffs being represented by Richard B. Price and Smith, Brucker, Winn & Ehlert, by Thomas H. S. Brucker, defendant being represented by George, Hull & Porter, P.S. by T. Dennis George and Laurie D. Kohli and also in attendance on behalf of defendant, Paul Stinneford, and the State of Washington, amicus curiae, being represented by Jon

Ferguson, and the court having considered the records and files and the following:

1. Defendant Spiegel's motion for summary judgment.

2. Spiegel's memorandum in support of motion for summary judgment.

3. Affidavit of Albert R. Bell

4. Affidavit of T. Dennis George

5. Affidavit of Michael R. Moran

6. Affidavit of Maurice Lagnado

7. Affidavit of Professor Gene Silberberg.

8. Affidavit of Professor E. Ray McAlister.

9. Plaintiff's brief in opposition to summary judgment and appendix.

10. Defendant Spiegel's reply brief.

11. Second Affidavit of T. Dennis George, dated 1/29/79.

12. Supplemental Affidavit of Richard B. Price, dated 3/7/79.

13. Memorandum of amicus curiae.

14. Affidavit of James A. Whitaker, dated 4/26/79.

15. Spiegel's brief in reply to memorandum of amicus curiae.

16. Depositions of George Whitaker, William T. Taylor, III, Maurice Lagnado, Albert H. Paul, Albert Bell, Walter Wolf, Stephen Reynolds and Mayer Shimfeld and the exhibits thereto.

The court having also heard and considered the arguments of counsel, and being of the opinion that no genuine issue of material fact exists and that the defendants motion may be ruled on as a matter of law, the court makes the following:

FINDINGS OF FACT

1. Defendant Spiegel is a Delaware corporation with its principal offices in Chicago, Illinois. Spiegel is engaged in the mail order merchandising of retail

consumer goods and products. Spiegel is a nationwide retail merchandiser soliciting business in all fifty (50) states. Spiegel has no offices in Washington.

2. Spiegel has specifically solicited business from Washington residents on a continuous and systematic basis by (1) mailings to Washington residents by means of merchandise catalogues and flyer mailings addressed to specific persons or mailings to a geographic area in the State of Washington; (2) advertising materials placed in monthly billing statements directed to Washington resident customers; and (3) in 1974 and 1975, through newspaper advertisements.

3. Washington residents fill out a printed standard order form prepared by Spiegel and mail it to Spiegel in Chicago, Illinois.

4. Upon receipt of an order form from a Washington resident, Spiegel attempts to verify the credit rating for the Washington resident by, among other means, use of local credit bureaus located in the State of Washington.

5. After verifying credit, Spiegel fills the order and the goods are mailed to the Washington resident at his or her address. The goods may come from a warehouse located in Illinois or the goods may be shipped directly from their place of manufacture which may be and are located throughout the United States. Spiegel directs bills from Illinois to Washington customers and receives payment from the customers by the customers sending payment to Spiegel in Illinois.

6. Spiegel charged a time price differential service charge of 19.8 percent, which rate is permissible under the law of Illinois, at all relevant times

until June, 1976, at which time it reduced its charge to 12%. Spiegel's service charge rate was and is disclosed in its catalogue.

7. Spiegel's credit sales to Washington residents are solicited on a continuous and systematic basis as opposed to being merely isolated or sporadic transactions. The result of Spiegel's active and purposeful solicitation of retail business from Washington residents has been successful in generating accounts receivable business. In 1974 Spiegel had an average of 31,048 Washington credit accounts and generated outstanding balances of $6,247,109.00. In 1975, there were on the average 26,070 credit customers from whom Spiegel generated $5,568,836.00, and in 1976 there were on the average 20,787 customers from whom Spiegel generated $4,594,524.00.

8. The printed order form prepared by Spiegel and submitted to Washington residents provides, among other things, that the Washington resident promises "to pay according to the contract terms set forth in your current catalogue," that "all credit orders must be for $10.00, or more, and are subject to Spiegel credit approval;" and further provides that if the customer orders additional merchandise after his or her initial order and has an unpaid balance in connection with such previous orders any new orders are to be "added to the existing balance as one account." In addition, each order form contains the provision, "I understand the contract is to be governed by Illinois law."

9. The customer is required to complete an order form each time he or she wants to purchase merchandise through Spiegel and must sign a Spiegel order form

containing the provisions as set forth above.

10. For those Washington residents with unpaid credit balances, Spiegel maintains monthly contact with each such Washington resident through its monthly billing and Spiegel has already identified Washington customers and segregated them out through special programming of its computer.

11. In the course of its business dealings with Washington residents, defendant keeps track of delinquent accounts. In handling delinquent accounts, Spiegel enlists the aid of collection agencies located in the State of Washington to act on its behalf. Although Spiegel sends the delinquent accounts to Washington collection agencies, the accounts remain Spiegel accounts and are not assigned to the collection agencies, and the collection

agencies handle the accounts "on Spiegel's behalf."

12. To the extent the collection agencies are not successful, Spiegel seeks and relies upon the benefit of Washington Courts where it seeks legal recourse against delinquent debtors.

Based on the foregoing, the court makes the following

CONCLUSIONS OF LAW

1. The Retail Installment Sales Act (RCW 63.14) is applicable to Spiegel's transactions with Washington customers.

A. The Retail Installment Sales Act Does Not Exempt Revolving Charge Agreements from the One Percent (1%) Per Month Service Charge Rate Limitation

1. Spiegel's exacting of a time-price differential in connection with its dealings with Washington residents is subject to the Retail Installment Sales Act, RCW 63.14 (RISA). A reading of the entirety of RCW 63.14 evidences a clear intention on

the part of the Legislature to govern the type of transaction involved here.

2. Although RISA distinguishes between "retail installment contracts" and "revolving charge agreements," the distinction is not for the purpose of exempting one or the other of the transactions from the service charge rate limitation but rather for the purpose of differentiating between disclosure requirements which require different considerations because of the differences in the buyer's and seller's dealings with one and another between the two transactions.

3. Although Spiegel argues that Section 63.14.060 is an attempt to exempt revolving charge agreements from the time-price differential limitation, such a reading is a strained reading in that Section 63.14.060 recognizes that the reporting requirements required in 63.14.040 can't necessarily be handled in the same

manner on a mailing basis as in a face to face transaction.

4. Section 63.14.060 rather supports the proposition that the Legislature did consider mail order transactions to be governed since it was providing a different type of disclosure program in the different types of credit transactions.

5. Further, 63.14.180 demonstrates amply that revolving charge agreements as well as installment contracts are governed by this legislation and are subject to the present one percent (1%) per month limitation on the time-price differential.

B. Spiegel's Contentions that the Contracts Between Washington Residents and Spiegel Were Not "Entered Into and/or Performed" in the State of Washington as Provided in RCW 63.14 are Without Merit.

1. It is Spiegel who purposely brings its presence into the State of Washington by purposely and systematically contacting Washington citizens residing in

the State of Washington. This is not a situation where a Washington resident travels to Chicago, Illinois, in order to enter into a contractual agreement.

2. Spiegel's application mailed to Washington residents is an offer to sell consumer merchandise to them, and upon the Washington residents' signing and posting the application in the mail, such posting constitutes an acceptance and a contractual arrangement has been "entered into" in terms of basic contractual law and this occurs in the State of Washington.

3. The fact that Spiegel makes a credit check before deciding whether or not to fill the order and/or mail the goods to the Washington resident doesn't detract from the fact that by posting the signed application that a retail installment transaction has been "entered into" in Washington.

4. The question of interpreting the RISA's meaning and intent with respect to "entered into and/or performed" in the State of Washington must be viewed in terms of the parties' activities as they relate to the RISA and not as they relate to a question of subjecting Spiegel to taxation or corporate license requirements within this State.

5. Spiegel's activities in soliciting business within the State of Washington and being successful in that regard and Spiegel's activities in employing local service businesses to service its customers' products in this State, and Spiegel's use of local credit bureaus to check credit references in the State of Washington, and Spiegel's activities in employing collection agencies as its agent to collection accounts from Washington residents in the State of Washington, and Spiegel's activities in using Washington Courts to enforce

their agreements establish beyond any doubt a presence in the State of Washington such that the RISA must and does apply under such circumstances.

C. The Retail Installment Sales Act is Not Unconstitutionally Vague

Spiegel's argument that the Retail Installment Act is unconstitutionally vague by virtue of Section 63.14.060 is without merit. Spiegel's attempt to distinguish retail installment contracts from revolving charge agreements in mail order type of situations is a strained distinction and construction. One must read the chapter as a whole and when doing so, it is apparent that no such distinction was permitted by the Legislature in terms of subjecting one type transaction to the one percent (1%) per month limitation and deleting the other therefrom. Again, this Court refers to 63.14.180 which provides in part as follows, to wit:

> "Any person who enters into a retail installment contract or charge agreement which does not comply with the provisions of this chapter . . . the parties shall be barred from recovery of any service charge. . ." (Court's emphasis)

II. The Washington State Usury Statute /RCW 19.52 is Applicable to Spiegel's Transactions with Washington Residents.

Notwithstanding Hafer v. Spaeth, 22 Wn.2d 378, "retail installment transactions" are subject to the usury statute of this State. This Court reaches such conclusion from a reading of National Bank of Commerce v. Thomson, 80 Wn.2d 406, wherein the Court specifically discredits the rationale in Hafter (sic) v. Spaeth, supra, as follows at page 411, to wit:

> "'Today, the belief that one borrows money from need but purchases on credit by choice is manifestly anachronistic.' If it is true that persons that purchase on installment terms, automobiles and other items of merchandise which they feel they need, are under economic pressure as severe as that which influences borrowers of money to accept the oppressive terms, then there is no logical reason to make a distinction between the exacting of excessive charges for deferring

> payments, and the exacting of such charges for loaning money."

It is further clear that the Legislature in enacting the RISA was attempting to provide the exact same protection to Washington citizens engaged in installment transaction purchases as those engaged in obtaining bank loans of money.

It is also apparent from policy statements that the usury laws of this State are as applicable to retail installment transactions as they are to the loaning of money.

In addition, the United States Internal Revenue Service has recognized that time price differentials being denominated service charges in retail installment transactions are legitimately considered interest the same as for the loaning of money.

Times have charged from the era of Hafer v. Spaeth, supra, when consumer

purchases were financed primarily through bank loans to the present day when retail installment transactions, including mail order transactions, are the major source of financing consumer purchases. The rationale of Hafer v. Spaeth, supra, is no longer germane in this era, and this Court recognizes that the time price differential is as much a forbearance as that which is involved in a bank loan transaction.

This Court finds RCW 19.52 to be applicable to Spiegel's transactions, and as such, Spiegel is in violation of the usury statute.

III. The Consumer Protection Act (RCW 19.86) Has Not Been Violated by Spiegel.

The Consumer Protection Act was and is directed at "unfair" or "deceptive" practices.

Because there was a disclosure as to the type of activies which Spiegel was

engaged in in this State, the concept of unfairness or deception does not appear applicable, and as such, Spiegel's activities are not in violation of the prohibitions of the Consumer Protection Act. Spiegel's conduct in charging its Washington customers a service charge rate of 19.8% was not unfair, deceptive, unscrupulous or dishonest.

IV. Conclusions With Respect to Conflict of Law Principles.

Applying the strong public policy considerations behind the Retail Installment Sales Act and the Usury Act, set forth throughout the statutes, effect should be given to Washington law rather than that of Illinois.

The plaintiffs in this case are distinguishable from the class representatives in O'Brien v. Shearson Hayden Stone, Inc., 90 Wn.2d 680, 586 P.2d 830 (1978) as to whom California law was determined

to apply, for two reasons: (1) in O'Brien, the defendant's solicitation of the class representatives' business occurred in California, whereas in this case Spiegel's solicitation of business took place in Washington; and (2) O'Brien involved a business transaction, not a consumer transaction.

In this case, solicitation occurred here, substantial solicitation, carried on through a continuous, systematic, and purposeful course of conduct resulting in significant Washington residents' involvement. When this is coupled with the aspect of the offer and receipt of millions of dollars worth of goods here, and Spiegel's reliance upon Washington service businesses, credit bureaus, collection agencies and our Courts, it all adds up to the fact that there is a substantial and significant contact in Washington supporting the application of Washington law.

V. The Stipulated Provision in the Order Form Providing That Illinois Law Shall Apply is not Valid.

The most obvious reason for not applying Illinois law is that this is a consumer transaction, not a commercial transaction. In a consumer transaction, public policy consideration behind the RISA and the Usury Act dictates that Washington law applies over a printed form and a standard form contract where there is no room for bargaining and no negotiation, in fact, takes place.

The Second Restatement of Conflicts of law sets forth a specific exemption relieving parties from stipulated law provisions where strong policy considerations are involved. This is a case where those considerations do control.

In addition, there is a substantial difference in the interest rate allowed in Washington of 12% and that being exacted by

Spiegel of 19.8%, and conflicts of law principles dictate that where stipulated law provisions violate the fundamental public policy of Washington law to such a great extent it is proper to invalidate the stipulated law provisions that requires the application of the foreign law.

VI. Plaintiff's Allegation of Spiegel's Constitutional Violation is Moot.

The question of whether or not Spiegel's activity contravenes the Washington State Constitution, Article XII, Section 7, is rendered moot by virtue of this Court's ruling that Spiegel is subject to and in violation of the Washington State Retail Installment Sales Act and the Washington Usury Act.

VII. With Respect to the Constitutional Issues Raised by Spiegel that Imposition of Washington Law Would Constitute (1) an Undue Burden on Interstate Commerce, and (2) be Discriminatory; as to it, the Court Rejects Both Arguments.

A. No Burden on Interstate Commerce. The question of whether or not Spiegel is able to earn a profit in Washington is not a judicial decision, but rather strictly a business decision.

Giving effect to Washington law so long as it is applied non-discriminatorily is the purpose of judicial determination and not the result of giving effect to Washington law upon a particular business. This Court recognizes that there have been many environmental issues decided in recent years which have necessarily and adversely affected many business operations even to the extent of businesses having to close shop.

There is no constitutionally protected right to do business in a particular manner or in a particular way and it is not this Court's function to determine whether a service charge limitation or interest rate limitation of one percent (1%) per month is appropriate or not, as that is one for the Legislature.

B. Discrimination: Spiegel is a mail order house, and it has chosen its method of doing business. There has been no showing by Spiegel that it is discriminated against or would be discriminated against by imposition of Washington State law.

Subjecting Spiegel to the RISA and Usury Act places Spiegel in the same position of having to adhere to the same rules and regulations as other businesses attempting to deal with Washington citizens in the State of Washington.

Pursuant to rule 54(b) and paragraph 5 of the order of the court of 30 September,

1978, upon entry of this order plaintiffs may reassert their motion for class certification. There is no just reason for delay and entry of this judgment, and therefore, judgment is directed to be entered forthwith.

DONE IN OPEN COURT this 4 day of September, 1979.

/s/ Richard P. Guy
SUPERIOR COURT JUDGE

Presented by:

/s/
RICHARD B. PRICE
Attorney for Plaintiffs/Co-Counsel

and

SMITH, BRUCKER, WINN & EHLERT

Co-counsel/Attorneys for Plaintiff

By /s/
THOMAS H. S. BRUCKER

Copy received, notice of presentment waived, this 31 day of August, 1979.

GEORGE, HULL & PORTER, P.S.
Attorneys for Defendant

By /s/
T. Dennis George

A-105

Filed
June 4 AM 10:25
Clerk

THE SUPREME COURT OF WASHINGTON

GEORGE WHITAKER, ET AL,
Respondents,

v.

SPIEGEL, INC.,
Appellant.

No. 47087-1

ORDER AMENDING OPINION UPON MOTION FOR RECONSIDERATION

The Court having considered the appellant's motion for reconsideration herein, and desiring to revise and clarify the opinion of the Court in certain respects, it is hereby ordered that the opinion of the Court in the above cause, as the same appears at 95 Wn.2d 408, be changed as follows:

1. The sentence appearing in lines 13 through 16 on page 414 is changed to read:

> Rather, the legislature has directed that, in an action brought in Washington on an allegedly usurious transaction, Washington's usury law will apply if the debtor was a resident of

Washington at the time the loan was made, even if the loan was made outside the state.

2. The following language is inserted immediately before the paragraph which begins in the third line from the botton of page 423:

> The last question we must decide is whether our decision should have a retroactive effect. In light of the impact on presently existing agreements entered into over many years in reliance on the usury statute, RCW 19.52, as construed in Hafer v. Spaeth, 22 Wn.2d 378, 156 P.2d 408 (1945), we think justice requires that this decision be applied prospectively only, except for a limited retroactive application to the parties in this case.
>
> Courts may give a party the benefit of its own lawsuit, where that party has prevailed in its contention that the old law should be overruled. Cascade Security Bank v. Butler, 88 Wn.2d 777, 784, 567 P.2d 631 (1977). However, "[a]ppellate courts possess the power to give their decisions prospective effect, i.e., not to apply the decision to the parties in the overruling case." Cascade Security Bank, at 785. If a party has justifiably relied on the overruled case, we must decide whether a retroactive application of the

overruling decision would defeat these reliance interests. Geise v. Lee, 10 Wn. App. 728, 732-33, 519 P.2d 1005 (1974), rev'd on other grounds, 84 Wn.2d 866, 529 P.2d 1054 (1975).

Over the years since the Hafer decision, there have been untold numbers of transactions in reliance on that decision. Indeed, the Attorney General has recently published an opinion advising that the usury statute did not apply to installment sales of real property and relying on Hafer. Attorney General Opinion, May 20, 1980. It would be unfair now to give our decision a general retroactive effect and expose well meaning vendors to the consequences of charging interest that has become usurious as a result of this decision. Thus, as to all affected persons not parties to this lawsuit, the decision will apply prospectively only from the date of filing.

As to the parties herein, however, there has been no reliance on Hafer. Respondents, the prevailing parties, urged that Hafer be overruled, as we have done. Spiegel has never relied on Hafer, since it at all times during this litigation insisted that Illinois law applied to the subject transactions. As a result, it has suffered no hardship occasioned by its reliance on Hafer. Accordingly, the decision is given limited retroactive effect as to the parties to this lawsuit only. Cascade Security Bank v. Butler, supra; Taskett v. KING Broadcasting Co., 86 Wn.2d 439, 546 P.2d 81 (1976).

It is further ordered that the motion for reconsideration be, and the same hereby is, otherwise denied.

Dated this 4th day of June, 1981.

s/ Robert F. Brachtenbach
Chief Justice

We concur:

s/Hugh J. Rosellini

s/Floyd V. Hicks

s/Charles F. Stafford

s/William H. Williams

s/Robert F. Utter

s/James M. Dolliver

COPY RECEIVED
Aug 25, 1981
GEORGE, HULL & PORTER, P.S.

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

GEORGE WHITAKER, et ux., et al., Respondent and Cross Appellants, V. SPIEGEL, INC., a foreign corporation, Appellant.	)	NO. 47087-1 NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that appellant Speigel, (sic) Inc. hereby appeals to the Supreme Court of the United States from the decision of the Washington Supreme Court entered on February 11, 1981 as modified by the Order Amending Opinion Upon Motion for Reconsideration entered June 4, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED this 21st day of August, 1981.

GEORGE, HULL & PORTER, P.S.

By /s/ T. Dennis George
T. Dennis George

By /s/ Laurie D. Kohli
Laurie D. Kohli
Attorneys for Appellant
Spiegel, Inc.

RECEIVED
AUG 24, 1981
CLERK OF SUPREME COURT
STATE OF WASHINGTON

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AUG 26, 1981
GEORGE, HULL & PORTER, P.S.

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AUG 24, 1981
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AUG 24 1981
SUPERIOR COURT
SPOKANE COUNTY WA

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

GEORGE WHITAKER, et ux., et al., Plaintiffs, v. SPIEGEL, INC., a foreign corporation, Defendant.	NO. 23544 COPY OF NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

Pursuant to S.Ct. Rule 10.3, defendant Spiegel hereby files a copy of its Notice of Appeal to the United States Supreme Court from the decision rendered in this action by the Washington Supreme Court.

Dated this 21st day of August, 1981.

GEORGE, HULL & PORTER, P.S.

By /s/ Laurie D. Kohli
Laurie D. Kohli
Attorneys for Defendant
Spigel (sic), Inc.

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

GEORGE WHITAKER, et ux., et al., Respondent and Cross Appellants, V. SPIEGEL, INC., a foreign corporation, Appellant.	)	NO. 47087-1 NOTICE OF APPEAL

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GEORGE, HULL & PORTER, P.S.

By /s/ T. Dennis George
T. Dennis George

By /s/ Laurie D. Kohli
Laurie D. Kohli
Attorneys for Appellant
Spiegel, Inc.

REVISED CODE OF WASHINGTON

CHAPTER 19.52

INTEREST--USURY

19.52.005 Declaration of policy. RCW 19.52.005, 19.52.020, 10.52.030, 19.52.032, 19.52.034, and 19.52.036 are enacted in order to protect the residents of this state from debts bearing burdensome interest rates; and in order to better effect the policy of this state to use this state's policies and courts to govern the affairs of our residents and the state; and in recognition of the duty to protect our citizens from oppression generally.

19.52.020 Highest rate permissible--Setup charges. Any rate of interest not exceeding twelve percent per annum agreed to in writing by the parties to the contract shall be legal, and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest, sum or value for

the loan or forbearance of any money, goods or things in action than twelve percent per annum: Provided, That in any loan of money in which the funds advanced do not exceed the sum of five hundred dolalrs, a setup charge may be charged and collected by the lender, and such setup charge shall not be considered interest hereunder: Provided further, That such setup charge does not exceed four percent of the amount of funds advanced, or fifteen dollars, whichever is the lesser, except that on loans of under one hundred dollars a minimum not exceeding four dollars may be so charged.

19.52.034 Application of chapter 19.52 to loan or forbearance made outside state. Whenever a loan or forbearance is made outside Washington state to a person then residing in this state the usury laws found in chapter 19.52 RCW, as now or hereafter amended, shall be applicable in all courts

of this state to the same extent such usury laws would be applicable if the loan or forbearance was made in this state.

REVISED CODE OF WASHINGTON

CHAPTER 63.14

RETAIL INSTALLMENT SALES OF GOODS AND SERVICES

63.14.010 Definitions

In this chapter, unless the context otherwise requires:

(1) "Goods" means all chattels personal when purchased primarily for personal, family or household use and not for commercial or business use, but not including money or, except as provided in the next sentence, things in action. The term includes but is not limited to merchandise certificates or coupons, issued by a retail seller, to be used in their face amount in lieu of cash in exchange for goods or services sold by such a seller and goods which, at the time of sale or subsequently, are to be so affixed to real property as to become a part thereof, whether or not severable therefrom;

(2) "Services" means work, labor or services of any kind when purchased primarily for personal, family or household use and not for commercial or business use whether or not furnished in connection with the delivery, installation, servicing, repair or improvement of goods and includes repairs, alterations or improvements upon or in connection with real property, but does not include services for which the price charged is required by law to be determined or approved by or to be filed, subject to approval or disapproval, with the United States or any state, or any department, division, agency, officer or official or either as in the case of transportation services;

(3) "Retail buyer" or "buyer" means a person who buys or agrees to buy goods or obtain services or agrees to have services rendered or furnished, from a retail seller;

(4) "Retail seller" or "seller" means a person engaged in the business of selling goods or services to retail buyers;

(5) "Retail installment transaction" means any transaction in which a retail buyer purchases goods or services from a retail seller pursuant to a retail installment contract or a retail charge agreement, as defined in this section, which provides for a service charge, as defined in this section, and under which the buyer agrees to pay the unpaid balance in one or more installments or which provides for no service charge and under which the buyer agrees to pay the unpaid balance in more than four installments;

(6) "Retail installment contract" or "contract" means a contract, other than a retail charge agreement or an instrument reflecting a sale made pursuant thereto, entered into or performed in this state for a retail installment transaction. The term

"retail installment contract" may include a chattel mortgage, a conditional sale contract and a contract in the form of a bailment or a lease if the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of the value of the goods sold and if it is agreed that the bailee or lessee is bound to become, or for no other or a merely nominal consideration, has the option of becoming the owner of the goods upon full compliance with the provisions of the bailment or lease;

(7) "Retail charge agreement," "revolving charge agreement" or "charge agreement" means an agreement entered into or performed in this state prescribing the terms of retail installment transactions which may be made thereunder from time to time and under the terms of which a service charge, as defined in this section, is to

be computed in relation to the buyer's unpaid balance from time to time;

(8) "Service charge" however denominated or expressed, means the amount which is paid or payable for the privilege of purchasing goods or services to be paid for by the buyer in installments over a period of time. It does not include the amount, if any, charged for insurance premiums, delinquency charges, attorneys' fees, court costs or official fees;

(9) "Cash sale price" means the price for which the seller would have sold or furnished to the buyer, and the buyer would have bought or obtained from the seller, the goods or services which are the subject matter of a retail installment transaction, if the sale had been a sale for cash. The cash sale price may include any taxes, registration and license fees, and charges for transferring vehicle

titles, delivery, installation, servicing, repairs, alterations or improvements;

(10) "Official fees" means the amount of the fees prescribed by law for filing, recording or otherwise perfecting, and releasing or satisfying, a retained title, lien or other security interest created by a retail installment transaction;

(11) "Time balance" means the principal balance plus the service charge;

(12) "Principal balance" means the cash sale price of the goods or services which are the subject matter of a retail installment contract less the amount of the buyer's down payment in money or goods or both, plus the amounts, if any, included therein, if a separate identified charge is made therefor and stated in the contract, for insurance and official fees;

(13) "Person" means an individual, partnership, joint venture, corporation, association or any other group, however organized;

(14) "Rate" means the percentage which, when multiplied times the outstanding balance for each month or other installment period, yields the amount of the service charge for such month or period.

63.14.130 Retail installment contracts and retail charge agreements--Service charge, composition, other fees and charges prohibited--Maximums

The service charge shall be inclusive of all charges incident to investigating and making the retail installment contract or charge agreement and for the privilege of making the installment payments thereunder and no other fee, expense or charge whatsoever shall be taken, received, reserved or contracted therefor from the buyer.

(1) The service charge, in a retail installment contract, shall not exceed the highest of the following:

(a) One per cent per month on the outstanding unpaid balance; or

(b) Ten dollars.

(2) The service charge in a retail charge agreement, revolving charge agreement or charge agreement, shall not exceed one per cent per month on the outstanding unpaid balances. If the service charge so computed is less than one dollar for any month, then one dollar may be charged.

(3) A service charge may be computed on the median amount within a range which does not exceed ten dollars and which is a part of a published schedule of consecutive ranges applied to an outstanding balance, provided the median amount is used in computing the service charge for all balances within such range.

(4) The service charge in a retail installment contract or charge agreement shall not exceed the rate of twelve per cent per annum, computed monthly. A service charge computed by one of the foregoing methods, or within the permitted minimum charges, shall be deemed not to be in excess of twelve per cent per annum computed monthly.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-462

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SPIEGEL, INC.,
Appellant,

v.

GEORGE WHITAKER and MARGARET C. WHITAKER
and ALL OTHER PERSONS SIMILARLY SITUATED
SINCE DECEMBER 5, 1968,
Appellees.

MOTION TO DISMISS OR AFFIRM

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NO. 81-462

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

SPIEGEL, INC.,
Appellant,

v.

GEORGE WHITAKER and MARGARET C. WHITAKER and ALL OTHER PERSONS SIMILARLY SITUATED SINCE DECEMBER 5, 1968,
Appellees.

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the application to appellant of Washington State interest and usury laws under the Washington Usury Statute, Wash. Rev. Code § 19.52, the Washington State Retail Installment Sales Act, Wash. Rev. Code § 63.14, and the State Consumer Protection Act, Wash. Rev. Code § 19.86. Appellant is a mail order house with main offices in Chicago, Illinois.

The statutes, prior to 1981 amendments, limited interest rates on credit transactions with Washington residents to 12% and usury rates for loans to Washington State residents to the same rate.

B. The Proceedings Below

Respondent, as a representative of a class of Washington State consumers who

purchase household goods on credit from appellant, brought suit in state court alleging that appellant's charging of 19.6% interest on credit transactions violated the Washington Retail Installment Sales Act (Wash. Rev. Code § 63.14), the Washington Usury Law (Wash. Rev. Code § 19.52), the Washington Consumer Protection Law (Wash. Rev. Code § 19.86) and Article XII, Section 7 of the Washington State Constitution. By agreement among counsel, certification of the class was deferred until after a decision on the merits. Appellant brought its motion to dismiss the claims on the grounds that Washington law did not apply to it and, if was so construed to apply, violated the Commerce Clause of the United States Constitution. Appellants motion to dismiss was denied, the trial court holding that both the retail installment sales act and usury act provisions were applicable to appellant and their application did not

violate the commerce clause. On appeal to the Washington State Supreme Court, that Court affirmed the trial court and, in addition, ruled that appellant's activities violated the Washington Consumer Protection Act. 95 Wn.2d 661 (1981).

II.

ARGUMENT

The case presents no substantial federal question. Three times in recent years, this Court has declined to review an appellate decision upholding a state law limiting interest rates against commerce clause arguments made by mail order houses. State ex rel. Meierhenry v. Spiegel, Inc., ___ S.D. ___, 277 N.W. 2d 298 (1979), appeal dis., 444 U.S. 804 (1979); Aldens, Inc. v. Lafollette, 552 F.2d 745 (7th Cir. 1977), cert. den., 434 U.S. 880 (1977); and Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975), cert. den., 425 U.S. 943

(1976). This appeal by Spiegel should also be dismissed because the decision by the court below was consistent with the three cited cases and presents no special issues meriting review.

Spiegel bases its petition on a purported need for national uniformity over interest rates (Jurisdictional Statement, p. 8). There is, however, no need for national uniformity here. Interest rates and usury have historically been considered matters of local concern and no case or federal law holds to the contrary. See Aldens, Inc. v. Packel, 524 F.2d 38, 43 (3d Cir. 1975), cert. den., 425 U.S. 943; Aldens, Inc. v. Lafollette, 552 F.2d 745, 751 (7th Cir. 1977), cert. den., 434 U.S. 880 (1977); State ex rel. Meierhenry v. Spiegel, Inc., 277 N.W.2d 298, 301 (1979), appeal dis., 444 U.S. 804; 15 USCA § 1610(b). Even Spiegel in its petition asserts that the federal regulation

limiting state interest and usury rates has been accomplished, " . . . on a peacemeal basis and for specific problems." (Jurisdictional Statement, p. 8). There never has been a need for national uniformity in this field.

Regardless of whether or not a court is required to "balance" the local interest with the impact on interstate commerce, the result is still the same. First, the fact that Washington's interest and usury laws cause Spiegel an economic hardship is obviously no defense. Ferguson v. Skrupa, 372 U.S. 726, 731 (1963). All the cases that have engaged in balancing have arrived at the conclusion that the state interest is sufficient to justify whatever the impact may be on interstate commerce. State ex rel. Meierhenry at 301; Packel at 43-44; Lafollette at 751. Likewise, as the Washington Supreme Court pointed out in this case, there is a particularly

strong state policy in the state's usury act, Wash. Rev. Code § 19.51.005 and, in addition, the interest rates at issue in this case were established by Washington State voters in an initiative. Whitaker v. Spiegel, Inc., 95 Wn.2d at 676.

Further, in 1981 the Washington legislature enacted comprehensive amendments to its usury and interest laws, so the problems of which Spiegel complains are no longer relevant. Chapter 77, 1981 Wash. Laws, amended the Retail Installment Sales Act, Wash. Rev. Code § 63.14, to raise the allowable interest on consumer goods to 18% and Chapter 78, 1981 Wash. Laws, raised the usury level to a sliding scale of,

> . . . four percentage points above the equivalent coupon issue yield (as published by the Federal Reserve Board of San Francisco) of the average bill rate for twenty-six week treasury bills as determined at the first bid market auction conducted during the preceeding calendar month, . . .

Finally, appellees cannot let go unchallenged some of appellant's contentions as to the facts. Spiegel contends (Jurisdictional Statement, p. 4) that the "undisputed" evidence showed that Washington's 12% interest limitation "prohibited" interstate mail order houses from doing business in this state. That is not an accurate statement. Spiegel's evidence did show that because of the economic burden put on it by the 12% limitation, it could not operate in the State of Washington at a profit - and that is the only thing the evidence showed. It should be noted that Spiegel's logic in this case is that if it filed an affidavit by some economist that showed that it could not operate at a profit without charging 40% interest, that any state limitation of less than that would likewise be unconstitutional. This is clearly absurd. Further, there is no evidence that any retail operator anywhere

raised prices to cover the cost of credit; no evidence showing any analysis that retail prices in Washington were higher because of the 12% credit limitation; no evidence that other interstate mail order houses could not operate in Washington within the 12% credit limitation. Simply put, Spiegel's argument is that because of economic hardship, it chose not to live within the limitation existing before 1981. As noted above, economic hardship does not invalidate an otherwise valid state police power regulation.

To the extent that Spiegel relies on National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753 (1967), such reliance is clearly misplaced. That case is a tax case, involving an Illinois use tax act which imposed a duty on an out-of-state mail order seller to collect Illinois use taxes. As such, different considerations apply. National Bellas Hess at 756.

III.

CONCLUSION

Wherefore, appellees respectfully submit that the question upon which this appeal depends is so unsubstantial as not to need further argument and appellee respectively moves this Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Washington.

Respectfully submitted,

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